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No. 07-

IN THE
Supreme Court of the United States

MAJOR LEAGUE BASEBALL ADVANCED MEDIA
AND
THE MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,
Petitioners,

v.

C.B.C. DISTRIBUTION AND MARKETING, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

MARY K. BRAZA
G. MICHAEL HALFENGER
FOLEY & LARDNER LLP
777 East Wisconsin Ave.
Milwaukee, WI 53202
(414) 271-2400

VIRGINIA A. SEITZ*
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

STEVEN A. FEHR
DONALD R. AUBRY
JOLLEY, WALSH, HURLEY
RAISHER & AUBRY, P.C.
204 West Linwood Blvd.
Kansas City, MO 64111
(816) 561-3755

RUSSELL S. JONES, JR.
TRAVIS A. SALMON
SHUGHART THOMSON
& KILROY, P.C.
120 West 12th Street
Kansas City, MO 64105
(816) 421-3355

Counsel for Petitioners

* Counsel of Record

February 22, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0093 – WASHINGTON, D. C. 20002

ISSUES PRESENTED

1. Is CBC's unauthorized use of Major League baseball players' identities in its commercial fantasy-baseball games in violation of Missouri law insulated from liability by the First Amendment?

2. Is CBC's breach of its contractual obligations not to use or challenge Major League baseball players' identity rights after its License to use those rights expired insulated from liability by the First Amendment?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 505 F.3d 818 (8th Cir. 2007) and reproduced in the appendix to the petition ("App.") 1a-16a. The order denying the petition for rehearing and rehearing en banc, dated November 26, 2007, is reproduced at App. 80a-82a. The opinion of the United States District Court for the Eastern District of Missouri is reported at 443 F. Supp. 2d 1077 (E.D. Mo. 2006), and is reproduced at App. 17a-79a.

JURISDICTION

The opinion and judgment of the court of appeals were issued on October 16, 2007. A timely petition for rehearing and rehearing en banc was denied on November 26, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

INTRODUCTION AND SUMMARY OF ARGUMENT

For roughly ten years, the Major League Baseball Players Association ("MLBPA") licensed CBC Distribution and Marketing, Inc. ("CBC") to use defined "Player Rights" (the names, nicknames, signatures, biographical and statistical information, likeness and other identifying characteristics of its members) in CBC's products – internet fantasy baseball games. In the License Agreements, CBC agreed not to use or challenge the Rights after the Agreements expired. When the most recent Agreement expired and CBC could not get a new one, CBC for the first time asserted, and a divided court of appeals has now held, that enforcing the Players' state-law publicity rights *and* the Licensing

Agreements' no-use and no-challenge provisions would contravene the First Amendment. This decision is wrong and worthy of this Court's review.

It is well established that famous persons, including Major League baseball players, have a property right in their identities and that others may not use or exploit these identities *commercially* without the person's consent. See, *e.g.*, *Haelan Labs., Inc.* v. *Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953); 1 J. Thomas McCarthy, *The Rights of Publicity and Privacy* § 6.3, at 794-800 (2d ed. 2007). In virtually every case in which famous persons seek to prevent others from exploiting their identities for commercial gain, however, the defendant asserts that the First Amendment shields its commercial use of the famous person's identity. This Court's decision in *Zacchini* v. *Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977), instructed the lower courts that that the First Amendment does not always trump publicity rights and that valid state interests ur dergirding the right of publicity must be balanced against First Amendment interests.

In the years since *Zacchini*, conflict and confusion have arisen in the lower courts – including federal courts of appeals and the highest courts of several states – over the correct legal test for weighing the states' interest in enforcing publicity rights against the interests protected by the First Amendment. As one dissenting court of appeals judge said after reviewing three such tests, "the point of confusion most associated with the right of publicity law is *its interplay with the First Amendment*." *ETW Corp.* v. *Jireh Publ'g, Inc.*, 332 F.3d 915, 954 (6th Cir. 2003) (Clay, J., dissenting) (emphasis supplied). Numerous scholars agree that "the current legal landscape is a confusing morass of inconsistent, sometimes non-

existent, or mutually exclusive approaches, tests, standards, and guidelines, with the confusion only increased by several recent rulings." Mark S. Lee, *Agents of Chaos: Judicial Confusion in Defining the Right of Publicity-Free Speech Interface*, 23 Loy. L.A. Ent. L. Rev. 471, 472 (2003). Only this Court can end the current muddle on this important and recurring question of federal law.

For example, Missouri state courts apply a "predominant purpose" test, see *Doe* v. *TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003); California, a "transformative" test, see *Comedy III Prods., Inc.* v. *Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001); and the Second and Sixth Circuits, and Kentucky, a "relatedness" test derived from the *Restatement (Third) of Unfair Competition* ("*Competition Restatement*") § 47 cmt. c (1995); see *Rogers* v. *Grimaldi*, 875 F.2d 994 (2d Cir. 1989); *Parks* v. *LaFace Records*, 329 F.3d 437 (6th Cir. 2003); *Montgomery* v. *Montgomery*, 60 S.W.3d 524, 529 (Ky. 2001). New York and Virginia ask whether the use of identity is for "purposes of trade." See *Competition Restatement* § 47; *Town & Country Props., Inc.* v. *Riggins*, 457 S.E.2d 356, 362-63 (Va. 1995); *Gautier* v. *Pro-Football, Inc.*, 107 N.E.2d 485, 488 (N.Y. 1952). The Ninth Circuit appears to hold that the *commercial use* of publicity rights to sell products is virtually never protected, even if the use has expressive elements such as parody. See *White* v. *Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1401 (9th Cir. 1992).

The Eighth Circuit in this case, the Tenth Circuit in *Cardtoons, L.C.* v. *Major League Baseball Players Ass'n*, 95 F.3d 959 (10th Cir. 1996), and the Sixth Circuit in *ETW*, 332 F.3d 915, struck the balance by weighing societal interests in free use of famous

persons' identities against the particular *plaintiffs'* interests in preventing exploitation. In these courts' view, when celebrities and athletes are of interest to the public, are wealthy, and are able to exploit their identities by endorsing products, states have only a negligible interest in enforcing such persons' publicity rights. The First Amendment, it seems, would weigh more heavily against some publicity-rights plaintiffs than against others.

In practice, the choice of balancing test has proved outcome determinative, as the present case illustrates. Here, Major League players sought to enforce their publicity rights under Missouri law to prevent CBC, a seller of fantasy baseball games, from using their identities without consent. Both lower courts held that the players' identities were essential to make the games commercially viable. Had Missouri's "predominant-purpose" test been applied, the players' state-law rights would have been enforced, because CBC's fantasy baseball games predominantly and necessarily exploit players' identities for commercial gain. Had California's test been applied, again the players would have prevailed because CBC's products do not "transform" players' identities. Indeed, in *all* past cases in which famous persons' identities have been incorporated into games, including games using baseball players, courts have concluded that the state-law publicity right can be enforced, and that the First Amendment does not shield the game-maker seeking to sell a product based on public figures' identities. See 2 McCarthy, *supra* § 7:25, 7:28; 1 McCarthy, *supra* § 4:85 (citing cases).

The Eighth Circuit did not cite, let alone address, the precedent involving games or Missouri's "predominant purpose" test. Instead, it found that

the public's interest in the availability of information about players and the "game of baseball" outweighed the State's interest in, *inter alia*, protecting "the right of an individual to reap the rewards of his or her endeavors," and in "encourag[ing] a person's productive activities," App. 9a, at least where the plaintiffs are well-paid and able to earn money from endorsements. App. 9a. As other courts of appeals' decisions reflect, this *ad hoc* balancing test has become a device employed by those hostile to state-law publicity rights to prevent enforcement of those rights. The fact that baseball players, like other famous athletes and celebrities, earn an excellent living does not mean that any entrepreneur can take the players' identities and use them without consent for commercial purposes. Indeed, this Court made clear in *San Francisco Arts & Athletics, Inc.* v. *U.S. Olympic Comm.*, 483 U.S. 522 (1987) (plurality opinion), that the First Amendment does not protect such conduct, and the decision below is, accordingly, also inconsistent with that analysis.

The appropriate legal test for balancing state-law publicity rights and First Amendment interests is a recurring and important question on which this Court's instruction is needed. Numerous persons license commercial entities to use their identities in connection with commercial products. Most relevant here, professional athletes in many sports have routinely done so in connection with games and internet products, including fantasy sports games. The panel decision here disrupted extant business and reliance interests in the billions of dollars, as the record and *amici* in this matter reflect. Moreover, the same use of a famous person's identity will be unlawful or constitutionally protected depending upon which jurisdiction first addresses that use – an

outcome that is fundamentally unfair, particularly to national businesses, and wholly inconsistent with a uniform interpretation and application of the First Amendment.

The panel decision also misapplied the First Amendment and disrupted reliance interests when it held that enforcing CBC's contractual obligations not to use or challenge baseball players' identity rights after its Licensing Agreement expired was barred by the First Amendment. Specifically, the majority below held that the MLBPA's accurate representation that it owned the players' rights (as their authorized licensing representative) was invalidated by the First Amendment, excusing CBC from compliance with its obligations. App. 7a. This decision – that CBC did not bargain away any First Amendment rights that it had in the no-use and no-challenge provisions of its License – conflicts with decisions of other courts of appeals and is in substantial tension with decisions of this Court. And, the invalidation of the no-use and no-challenge provisions calls into question the enforceability of terms that are routinely included in licensing agreements and that form the basis of many commercial licensing arrangements. See *Saturday Evening Post Co.* v. *Rumbleseat Press, Inc.*, 816 F.2d 1191 (7th Cir. 1987). For this reason, too, the petition should be granted.

STATEMENT OF THE CASE

1.(a). *MLBPA and Its Licensing Program.* MLBPA is an unincorporated association comprised of virtually all persons employed as active Major League baseball players. CTA App. 0122 (Affidavit of Judith S. Heeter ("Heeter Aff.") ¶ 2). MLBPA is the exclusive collective-bargaining representative for Major League baseball players. *Id.* Through

individual authorizations executed by its members, MLBPA also possesses the exclusive right to use and license others to use the names, nicknames, signatures, biographical and statistical information, likeness and other identifying characteristics of its members ("players") in connection with all products and product lines featuring three (3) or more players ("Player Rights"). *Id.* at 0122 (¶ 3).

For over forty years, MLBPA has licensed Player Rights to hundreds of licensees. The best known licensed product is baseball cards, but licensed products have included apparel, collectibles, figurines, posters, and games. Relevant here, MLBPA has licensed the use of Player Rights in board games like Strat-O-Matic®; video, computer and other electronic games from Microsoft, Sega, Sony, Acclaim and EA Sports; and interactive games like SnapTV®. CTA App. 1115 (¶ 11), 1108 (¶ 1).

MLBPA first licensed a commercial fantasy baseball game in about 1991, when it licensed USA Today. CTA App. 1112 (¶ 3). By 2004 MLBPA had licensed CBS Sportsline, Yahoo, ESPN, Fox Sports, AOL and others to offer dozens of commercial fantasy baseball games. *Id.* at 0668, 1113 (¶ 3). According to a 2003 survey, nearly 90% of persons playing commercial fantasy baseball games were playing games MLBPA licensed. *Id.* at 1139, 1110 (¶ 7), 0644 (¶ 24).

MLBPA's fantasy baseball licenses – including CBC's – expired on December 31, 2004. In 2005, MLBPA entered into a License Agreement with MLB Advanced Media ("Advanced Media"), granting it the exclusive license to use and sublicense others to use Player Rights in interactive media, including Internet games. App. 3a. Thus, all entities that wished to use

Player Rights in interactive media had to obtain licenses from Advanced Media.

(b) *Fantasy Sports.* Commercial fantasy baseball games are part of a $1.5 billion fantasy sports industry in the United States. CTA App. 0029 (¶ 9), 1074 (¶ 15). Dozens of fantasy games are licensed not only by MLBPA, but also by the NFL Players Association, NBA Media Ventures, the NHL Players Association, and other rights-holders. For example, CBC has held licenses to use players' rights in fantasy football, basketball and hockey games. *Id.* at 1109 (¶ 3). Recognizing licensing to be the settled order of things, the Fantasy Sports Trade Association's Code of Ethics suggested that its members – including CBC – "be officially licensed by the Players Association if it applies (currently Baseball, Football, Hockey & Basketball)." *Id.* at 0655.

Participants in fantasy baseball games usually pay fees to join fantasy "leagues" and to make trades and roster moves. CTA App. 0029 (¶ 11). Customers of a fantasy baseball provider like CBC assume the role of a Major League team owner or general manager. They first select "actual MLB players for their team rosters," based on considerations unique to the player, game and manager. *Id.* at 0355 (¶ 4). Most games require the owner/manager to mirror a real Major League roster, with defined numbers of pitchers and position players. A fantasy team manager might try to select, for example, an infield with Albert Pujols at first base, Derek Jeter at shortstop, Joe Mauer catching, and Johan Santana pitching. Customers do not simply select players with the best statistics, or every customer would draft the same players. *Id.* at 0323 (¶ 14). Some games, like CBC's Diamond Baseball Challenge,

assign "salary values" or "fantasy values" to each player, and customers must draft players who fit under their "salary cap." *Id.* at 0490 (¶ 10). Other games only allow one fantasy team to own each player, so once he is "drafted", he is not available to other owners. *Id.* at 0355 (¶ 4). Customers also consider personal attributes. For example, some customers favor players from their "home" or favorite team; others favor players with particular characteristics (hustle, community service, team player, injury record). Others forecast which players will have break-through years based on spring training performance, off-season regimen, new marriage, or other events. *Id.* at 0221 (¶ 8), 0224 (¶ 15), 0182, 0249-51,0252-87,0288-90,0360-0436.

Once customers fill their rosters, they compete against other customers for cash prizes, based on the performance of their real-life players. CTA App. 0029 (¶ 10), 0206 (¶ 4), 0249 (¶ 2). CBC translates the actual players' real on-field performances (*e.g.*, hits, stolen bases, strike-outs, runs, etc.) into points, which are assigned to each fantasy team that owns each player. App. 19a-20a. At season's end, the team owner whose players have provided the owner with the most points wins his league, and the money. *Id.*; CTA App. 0490 (¶ 7). CBC's prizes range from $3,000 to $50,000. CTA App. 0662.

Using real Major League players is critical to fantasy baseball games' commercial success. When CBC's expert witness, Daniel Okrent, was asked whether CBC's game could be played without the actual players' names, he replied "no, it could not." CTA App. 0657. CBC's Brian Matthews stated that he had never seen a commercial fantasy baseball game that used "Player A" or "Player B" instead of "Albert Pujols." *Id.* at 1102. In advertising and

operating its games, CBC does not create fictional player profiles, with names, life stories, and fictional statistical histories. CBC's customers pay to own, manage, and potentially win with a roster of actual Major League players. See, *e.g.*, *id.* at 0442-43 (Expert Report of Kevin Saundry ¶¶ 10-14); App. 19a-20a.

(c) *CBC and Its Products.* CBC is a Missouri corporation. CTA App. 0028 (¶ 3). Using the trade name CDM Fantasy Sports, CBC markets, distributes and sells fantasy sports products, including fantasy baseball games accessible via telephone, mail, email, fax and the Internet through its website, www.CDMsports.com. App. 19a. It charges fees ranging from $29.99 to $1000 to own a fantasy team and play its fantasy baseball games. CTA App. 0182-84, 0662. CBC has earned more than $100 million in revenue and $15 million in profit from its fantasy sports games since 1992. *Id.* at 0124 (¶ 8), 0201. In 2004 and 2005 alone, CBC reported between $3.4 and $3.6 million in annual revenue from its fantasy baseball games. *Id.* at 1107; 1074 (¶ 15).

CBC, acting through CDM, approached MLBPA in early 1995 and applied for a license. CTA App. 1134. CBC entered into two License Agreements with MLBPA in 1995 and 2002. App. 20a. These agreements allowed CBC to use Player Rights in CBC's interactive fantasy baseball games. *Id.* at 20a-21a; see also CTA App. 0030 (¶ 15); see also *id.* at 0206-0209 (¶¶ 5, 7, 9, 10). Between 1995 and 2004, CBC paid MLBPA over $300,000 in royalties. *Id.* at 1109 (¶ 2).

In its License Agreements, CBC explicitly acknowledged MLBPA's capacity to license its members' rights in their names, numbers, nicknames, likenesses, signatures, pictures, playing

records and biographical data. App. 20a-21a; see also CTA App. 0165, 0207-0208.

CBC's License Agreements with MLBPA both contained a "Post-Termination" clause:

> 18(c) After the expiration or termination of this Agreement, Licensee . . . shall refrain from further use of the Rights and/or the Trademarks or any further reference to them, either directly or indirectly, in connection with the offering for sale, sale, shipment, advertising, promotion, publication and/or distribution of Licensee's products. [CTA App. 0173 ("no-use provision")].

Under this clause, after license expiration, CBC is obligated not to use the defined Player Rights in connection with the manufacturing, offering for sale, sale, advertising, promotion, publication and/or distribution of its fantasy baseball products. *Id.* See App. 21a.

CBC's License Agreements further provided that:

> during any License period of this Agreement, or thereafter, [CBC] will not dispute or attack the title or any rights of MLBPA in and to the Rights and/or the Trademarks or the validity of the license granted herein. [CTA App. 0169 (§ 9(a)) ("no-challenge provision").]

CBC's most recent License Agreement with MLBPA expired on December 31, 2004. CTA App. 0030 (¶ 15), 0208 (¶ 9).

2. *The Litigation* In January 2005, in response to Advanced Media's request, CBC submitted a proposal to Advanced Media for a sub-license to use Player Rights in CBC's fantasy baseball games. CBC turned down Advanced Media's offer to pay CBC to promote Advanced Media's fantasy baseball games on CBC's

website. App. 22a. CBC continued to sell its fantasy baseball games and, in February 2005, sued Advanced Media in federal court in St. Louis, seeking a declaratory judgment that it did not need a license to do so. *Id.*

MLBPA intervened to assert counterclaims, including breach of contract based on CBC's Licensing Agreements and violation of players' publicity rights.

By stipulation, all counts were dismissed except the claims and counterclaims related to the state-law publicity rights and enforcement of the Licensing Agreements. App. 23a & n.5.

After discovery, all three parties filed motions for summary judgment. In August 2006, the trial court rejected both MLBPA's contract and publicity-rights claims. Although CBC was violating its Licensing Agreement, the court held that a general federal policy favoring the full and free use of ideas preempted enforcing the contract under state law. App. 73a-76a.

The district court also held that CBC's games did not violate players' publicity rights because CBC was not using players' "identities" for "commercial purposes" within the meaning of Missouri law. App. 37a-38a. The court then found that if CBC was violating Missouri law, its use of players' identities in its products was nonetheless protected by the First Amendment. *Id.* at 51a-52a.

A divided Eighth Circuit affirmed. The panel held that CBC's use of the players' names in fact violated Missouri's right of publicity because CBC had used the players' names "as a symbol of [their] identity" without consent, and "with the intent to obtain a commercial advantage." App. 5a (citing *TCI*, 110

S.W.3d at 369); *TCI*, 110 S.W.3d at 370 (citing *Competition Restatement* § 46)).[1]

But the court held that enforcing the players' state-law rights would violate CBC's right of free speech protected by the First Amendment. The court ignored Missouri's test for balancing state-law publicity rights against First Amendment interests – *TCI*'s predominant-purpose test. See App. 7a-10a. Instead, the panel applied an *ad hoc* balancing test that considered the "public value" of information about baseball and baseball players, the nature of CBC's "speech," the un-likelihood of consumer confusion and the fact that the players were well paid to play baseball and endorse products. *Id.* Taking all this into account, the court held, the First Amendment "supercede[d] the players' rights of publicity." *Id.* at 10a.

The panel did not affirm the district court's decision that CBC's no-use and no-challenge obligations were unenforceable on grounds of federal policy, and rejected CBC's argument that the Association breached the warranty in § 1(b) of its Licensing Agreement. *Id.* at 11a. Instead, the panel *sua sponte* held that the Association breached a warranty of title contained in § 8(a) of the Agreement and could not enforce the no-use and no-challenge provisions because the First Amendment prevented the

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[1] The "right of publicity" tort has its origins in the right of privacy, but is an independent tort. *See TCI*, 110 S.W.3d at 368. "'[T]he right of publicity protects against commercial loss caused by appropriation of an individual's [identity] for commercial exploitation.'" *Id.* (alteration in original) (citation omitted). This right may be assigned and licensed. *See Haelan Labs.*, 202 F.2d at 868; 2 McCarthy, *supra* §§ 10:13-10:19.

Association from enforcing the players' publicity rights. *Id.* at 12a-13a.

Judge Colloton dissented from this part of the panel's opinion. He observed that "section 8(a) wins the day for CBC only if it is a warranty by MLBPA that CBC does not have rights under the First Amendment to use the players' names and statistics in fantasy baseball games." App. 14a. And, he explained that even assuming that § 8(a) addressed constitutional rights and that "one party's prediction about the constitutional rights of another party is the sort of 'fact' that can be warranted under New York law," "section 8(a) does not purport to make such a warranty." *Id.* at 14a-15a. Thus, he concluded that CBC simply "'agree[d]' as a matter of good business judgment, to bargain away any uncertain First Amendment rights that it may have in exchange for the certainty of what it considers to be an advantageous contractual arrangement." *Id.* at 15a. Finally, Judge Colloton agreed that the judgment invalidating the no-use and no-challenge provisions could not be sustained "on the grounds actually raised by CBC." *Id.* Accordingly, he would have reversed.

REASONS FOR GRANTING THE PETITION

In *Zacchini*, 433 U.S. 562, this Court held that where the First Amendment is raised as a defense to a state-law right of publicity claim, the two rights must be weighed against each other to ensure that both rights receive their due. But the courts have struggled to strike an appropriate balance, and there is now real and growing disarray and conflict on this issue in the federal courts of appeals and district courts, as well as in numerous state supreme courts. Differing tests have led to utterly inconsistent results

– for example, the decision below would have come out differently under several jurisdictions' tests, and it conflicts with outcomes in closely analogous cases widely viewed as governing law. The result when the First Amendment is raised as a defense should not vary based on where the action is brought. This Court's review is necessary to bring uniformity and certainty to a muddled but important area of law that this Court has not addressed since *Zacchini*.

Second, review is necessary on the related question of enforcing CBC's contractual no-use and no-challenge obligations. The court below refused to enforce CBC's promises on the ground that the MLBPA's representation that it was authorized to license the players' rights was invalid under the First Amendment. But CBC bargained away any First Amendment rights it may have had in its no-use and no-challenge provisions, as the dissenting judge recognized; and all other courts, including this Court and other courts of appeals, have held that such waivers are valid and enforceable. The Eighth Circuit's contrary conclusion threatens all contract commitments based on waivers of any First Amendment rights, including such routine provisions as no-use and/or no-challenge provisions in intellectual property licenses.

I. REVIEW IS WARRANTED TO RESOLVE CONFLICTS AMONG FEDERAL AND STATE COURTS CONCERNING WHEN THE ENFORCEMENT OF PUBLICITY RIGHTS VIOLATES THE FIRST AMENDMENT.

A. The Courts Are In Conflict About The Appropriate Legal Rule for Weighing State-Law Publicity Rights Against First Amendment Interests.

Federal and state courts employ a conflicting and confusing array of tests for determining when enforcing a famous person's state-law publicity rights would violate another's First Amendment rights. Only review by this Court can bring coherence to this body of law.

First, the court below could have followed Missouri's "predominant purpose" test for weighing the state's interest in enforcing publicity rights against any First Amendment interests implicated by enforcement. In *TCI*, the Missouri court observed that "the threshold legal question" is "whether the use of a person's name and identity is 'expressive,' in which case it is fully protected, or 'commercial,' in which case it is generally not protected." 110 S.W.3d at 373. See *id.* (use of identity "for purely commercial purposes, like advertising goods or services or *the use of a person's name or likeness on merchandise*, is rarely protected" (emphasis supplied)). The *TCI* court stated its "predominant purpose" test this way:

> If a product is being sold that predominantly exploits the commercial value of an individual's identity, that product should be held to violate the right of publicity and not be protected by the First Amendment, even if there is some

> "expressive" content in it that might qualify as "speech" in other circumstances. If, on the other hand, the predominant purpose of the product is to make an expressive comment on or about a celebrity, the expressive values could be given greater weight. [*Id.* at 374 (quoting M. Lee, *supra*, at 500).]

Colorado and New Jersey apply the same test. See *Joe Dickerson & Assocs., LLC* v. *Dittmar*, 34 P.3d 995, 1003 (Colo. 2001) ("[t]o resolve this question, courts must determine whether the character of the publication is primarily noncommercial, in which case the privilege will apply, or primarily commercial, in which case the privilege will not apply"); *Tellado* v. *Time-Life Books, Inc.*, 643 F. Supp. 904, 909-10 (D.N.J. 1986) (applying New Jersey law) ("[d]efendant would be liable for the tort of misappropriation of likeness only if defendant's use of plaintiff's likeness was for a predominantly commercial purpose . . . [t]he use must be mainly for purposes of trade, without a redeeming public interest, news, or historical value"). See also 2 McCarthy, *supra* § 8.13.

Second, New York and Virginia use a "purposes-of-trade" test, derived from *Competition Restatement* § 47, which resembles the "predominant-purpose" test in application. See *Gautier*, 107 N.E.2d at 488; *Riggins*, 457 S.E.2d at 362-63. In these states, the right of publicity wins over a First Amendment defense if the "[t]he name, likeness, and other indicia of a person's identity are used 'for purposes of trade' . . . if they are used in advertising . . . or are placed on merchandise marketed by the user, or are used in connection with services rendered by the user," unless the work is of the type traditionally

protected by the First Amendment (such as a movie or novel). *Competition Restatement* § 47.

Third, California uses a "transformative" test, which asks whether the speaker has transformed the person's name, likeness or identity in a way that is expressive. See *Comedy III*, 21 P.3d at 807-08. Where purported expression "takes the form of a literal depiction or imitation of a celebrity for commercial gain . . . without adding significant expression beyond the trespass, the state law interest in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist." *Id.* at 808. See also *Winter* v. *DC Comics*, 69 P.3d 473 (Cal. 2003).

Fourth, the court could have applied one of the tests employed by the Ninth Circuit. In cases involving the use of celebrities' identities in *commercial* speech, such as advertising – what the court characterizes as "the exploitation of celebrity to sell products, and an attempt to take a free ride on a celebrity's celebrity value" – the Ninth Circuit's rule is that publicity rights are protected notwithstanding a First Amendment defense. *White*, 971 F.2d at 1401 n.3. See also *Wendt* v. *Host Int'l, Inc.*, 125 F.3d 806 (9th Cir. 1997), *reh'g en banc denied*, 197 F.3d 1284 (9th Cir. 1999) (publicity rights in use of identities to attract customers to *Cheers*-themed bars could be enforced), *cert denied*, 121 S.Ct. 33 (2000); *Midler* v. *Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988) ("[i]f the purpose is informative or cultural the use is immune; if it serves no such function but merely exploits the individual portrayed, immunity will not be granted" (internal quotation marks omitted)).[2]

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[2] In cases involving *non-commercial speech*, the Ninth Circuit has held that the First Amendment protects use of public

Fifth, the Second and Sixth Circuits and the Kentucky Supreme Court employ a "relatedness" test, which examines the relationship between the use of a person's identity and a "work" protected by the First Amendment. *Montgomery*, 60 S.W.3d at 529 (use of a person's identity "within a work [biographical motion picture] that enjoys First Amendment protection" is actionable "if the use is not sufficiently related to the underlying work"); *Rogers*, 875 F.2d 994 (same, in motion picture using Ginger Rogers' identity); *Parks* 329 F.3d 437 (same, in rap song using Rosa Parks' identity). That test, like the "purposes-of-trade" test, see *supra* at 17, is based on *Competition Restatement* § 47, specifically comment c. It provides that, even in cases involving works traditionally protected by the First Amendment, a person using a public figure's identity without consent may be liable "if the name . . . is used solely to attract attention to a work that is not related to the identified person."[3] *Competition Restatement* § 47, cmt. c.

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figures' identities unless that use was undertaken with "actual malice." *Hoffman* v. *Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1188-89 (9th Cir. 2001) (parody involving Dustin Hoffman was protected expression).

[3] The "relatedness" test has been criticized for insufficient protection of the state-law rights. *See, e.g., Montgomery*, 60 S.W.3d at 535 (Keller, J., dissenting) ("[i]n my opinion, the governmental interest in protecting persons from such appropriations demands greater protection than an amorphous 'any relationship' test can accommodate").

Although the case is opaque, Florida appears to enforce publicity rights when the unauthorized use is for purposes of trade. If the use is not for purposes of trade, that is, if the use of publicity rights is in a work entitled to First Amendment protection, such as "a novel, play or motion picture," then Florida uses the relatedness test, asking whether the use is

Sixth, and finally, the Eighth Circuit in the decision below, as well as the Tenth and Sixth Circuits, have applied a test that can only be described as one of *ad hoc* balancing of society's interests in use of the person's identity against the particular economic and non-economic interests of the famous person whose identity is being used. Here, the Eighth Circuit held that enforcing the players' publicity rights would violate the First Amendment because baseball players' names and statistics are "readily available in the public domain," because there is "public value" and interest in information about baseball, and because baseball players are already "rewarded, and handsomely, too, for their participation in games and can earn additional large sums from endorsements and sponsorship arrangements." App. 7a, 8, 9a. For these reasons, the court thought that the players' rights "barely, if at all, implicate[d] the interests that states typically intend to vindicate by providing rights of publicity." *Id.* at 9a.

The Tenth Circuit also used an *ad hoc* balancing test in *Cardtoons*, 95 F.3d 959, a case in which players' identities had been used to ridicule them on parody baseball cards. The court found the First Amendment interest in protecting "social commentary on public figures" to be weighty, *id.* at 969, and that the State's and players' interests were negligible in that players' average salaries were over $1 million per year. *Id.* at 974. In addition, the players' interests were discounted because they "would still be able to reap financial reward from authorized appearances and endorsements." *Id.*

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related to the identified person. *See Tyne* v. *Time Warner Entm't Co.*, 901 So. 2d 802, 807-08 (Fla. 2005).

Similarly, in *ETW*, 332 F.3d 915, the Sixth Circuit balanced a painter's interest in a portrayal of Tiger Woods against Woods' interest in enforcing his state-law publicity rights, and held against Woods. The court stated that "Woods, like most sports and entertainment celebrities with commercially valuable identities, engages in an activity, professional golf, that in itself generates a significant amount of income which is unrelated to his right of publicity" and is "able to reap substantial financial rewards from authorized appearances and endorsements." *Id.* at 938.[4]

Thus the Eighth Circuit's *ad hoc* balancing test is just one of the several different and conflicting approaches taken by the lower courts in attempting to follow *Zacchini*'s instruction to weigh publicity rights and First Amendment interests. As one judge observed, "the point of confusion most associated with the right of publicity law is its interplay with the First Amendment." *Id.* at 954 (Clay, J., dissenting). See also M. Lee, *supra* at 472 ("courts have largely failed to fashion clearly-articulable standards [for balancing free speech and intellectual property rights] in what is arguably the newest form of intellectual property recognized in the United States – the right of publicity"); Jason K. Levine, *Can the Right of Publicity Afford Free Speech? A New*

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[4] As the *ETW* dissent observes, the majority opinion applies the *Competition Restatement* "relatedness" test, the balancing test of *Cardtoons*, and the California "transformative" test *seriatim*. "[T]he majority engages in three separate analyses, and arrives at three separate holdings, although all . . . reach the same result." 332 F.3d at 951 (Clay, J., dissenting). The *ETW* dissent would have adopted the "transformative" test, and concluded that under that test, Tiger Woods was entitled to enforce his publicity rights.

Right of Publicity Test for First Amendment Cases, 27 Hastings Comm. & Ent. L. J. 171, 184 (2004) ("[t]he lack of a clearly defined test for analyzing right of publicity cases where the First Amendment is implicated leaves open the possibility of widely varying and inconsistent holdings"); Roberta R. Kwall, *The Right of Publicity vs. The First Amendment: A Property and Liability Rule Analysis*, 70 Ind. L. J. 47, 47 (1994) ("[c]urrently, courts lack a principled and consistent method of resolving the conflict between the right of publicity and the First Amendment").

And these differences are not merely academic; usually the balancing test selected determines the outcome of the case. Here, the MLBPA would have prevailed had the court applied *TCI*, because the predominant purpose of CBC's use of players' identities was to create commercial viability for a predictive game so that consumers would be willing to pay to play. Any informational content of CBC's games is secondary to the manufacturers' predominant purpose – the sale of a product that customers want to buy and play.

Had the "transformative" test been applied here, the players also would have prevailed. The essence and attraction of CBC's games is that they use *real players and their achievements* to attract commercial attention to a product that is otherwise simply a prediction game. It is critical to the success of commercial fantasy baseball games that players' identities *not* be transformed in any way. The depiction of the celebrity "is the very sum and substance of the work in question," and thus CBC's depiction would not be protected by the First Amendment under the "transformative" test.

On the other hand, if the "relatedness" test had been applied here, the court would have first asked if CBC's prediction games are "work[s] that enjoys First Amendment protection," like a motion picture, rap song, or painting. If so, the court would have determined whether using Major League players in the games was solely to attract attention to games that are not related to the identified person. No court has applied the "relatedness" in a case akin to this one, which does not involve a work traditionally protected by the First Amendment, so the outcome is uncertain. What is certain, however, is that the analysis would look nothing like that undertaken by the Eighth Circuit or by courts employing either the "predominant purpose" or "transformative" tests.

As stated, the court here applied yet a different test, one of *ad hoc* balancing, similar to the tests used in *Cardtoons* and *ETW*. In doing so the court put too much weight on two characteristics shared by virtually all celebrities – public interest and high pay – as reasons to bar enforcement of their publicity rights. The states' decisions to enforce famous persons' publicity rights should not be overruled by courts hostile to the tort; the First Amendment does not require this result.[5]

As a practical matter, *ad hoc* balancing has resulted in a judicial refusal to enforce state-law

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[5] Nor is the result below a "victory" for free speech. The effect of the Eighth Circuit's opinion is simply to remove from fantasy game providers' balance sheets an obligation to pay royalties for the privilege of using players' identities. There is nothing in the record to support an argument that providers will reduce prices, pay larger prizes, or "speak" in ways hitherto unavailable to them. Cost-avoidance for fantasy sports providers, not any First Amendment interest, is the principal result of the decision below.

publicity rights. The argument that public availability of and interest in facts about famous persons who are well compensated is sufficient to trump publicity rights proves too much; if that is so, then the First Amendment bars nearly every publicity rights claim. This is because most persons whose identities have enough commercial value to be worth exploiting are celebrities, who tend to be well paid for doing what made them famous in the first place. And the economic interests served by publicity rights are not the athlete's or celebrity's interests in earning a living, but their interests in *controlling* the use of their persona for commercial purposes, in reaping the benefits of commercial use of their identities, and in avoiding the unjust enrichment of merchants who gain by exploiting another's identity. See, *e.g.*, *Competition Restatement* § 47; 1 McCarthy, *supra* § 1:3. "Fame is not an implied license to infringe the right of publicity." 2 McCarthy, *supra* § 10:34. The Eighth Circuit's approach placed far too little weight on the states' interest in protecting these rights.

The courts are in need of this Court's guidance to make the application of the First Amendment in this realm fair and consistent.

B. The Eighth Circuit's Decision Conflicts With All Previous "Game" Cases.

Because the legal test it used to weigh publicity rights and First Amendment interests was incorrect, the decision below has also created a conflict in the authority that specifically addresses the use of publicity rights in games. In all three cases involving infringement of publicity rights in board games, the courts rejected the game seller's argument that its use of athlete and celebrity identities was protected by the fact that the names and playing records were

publicly available in the media, or by the First Amendment. The Eighth Circuit did not cite, let alone try to distinguish, any of these cases.

Most factually apposite is *Uhlaender* v. *Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970), which addressed the use of the names, uniform numbers and statistics of Major League baseball players in board games that were precursors to today's fantasy baseball games. Following *Palmer* v. *Schonhorn Enterprises*, 232 A.2d 458 (N.J. Super. Ct. Ch. Div. 1967) (described below), the *Uhlaender* court held that even though the players' names and statistics were published in the news media and were therefore "in the public domain," they still had the right to control the commercial use of such names and records in games, because "in an appropriation action . . . the names and statistics are valuable only because of their past public disclosure, publicity and circulation." 316 F. Supp. at 1282-83.

In *Palmer* v. *Schonhorn Enterprises*, the game at issue included a "profile and playing chart" for 23 professional golfers, including a short biography of the playing career of each. 232 A.2d at 459. The defendant argued that because the printing of this information in the newspaper would be protected, its use in a board game must also be protected. The court emphatically rejected this argument, explaining that the use of names in the news was protected, but that "capitalizing upon the name by using it in connection with a commercial product" was not. *Id.* at 462.

Similarly, in *Rosemont Enterprises* v. *Urban Systems, Inc.*, 340 N.Y.S.2d 144, 145-46 (N.Y. Sup. Ct. 1973), the court rejected the argument that the Howard Hughes game educated consumers about the

events in Hughes' life and was no different than a book or magazine or movie:

> In reality, defendants are not disseminating news. They are not educating the public as to the achievements of Howard Hughes. They are selling a commodity, a commercial product, an entertaining game of chance, the outcome of which is determined by maneuvering tokens on a game board by the throw of the dice. The use of plaintiff's name, biographical data etc. in this context is not legitimate to the public interest. It is merely the medium used to market a commodity familiar to us all in its varied types and forms. [*Id.* at 146.]

See also *Rosemont Enters.* v. *Choppy Prods., Inc.*, 347 N.Y.S.2d 83, 85 (N.Y. Sup. Ct. 1972) (enforcing Howard Hughes' publicity rights in cases involving the sale of t-shirts, buttons, and a board game using his name and picture, and "find[ing] no validity in [defendants'] argument that the violation is protected by the constitutional right of free speech").

The Eighth Circuit's decision thus contravenes settled law concerning the interaction between publicity rights used in commercial games and the First Amendment. Critically, this long standing authority has weight and importance far beyond the particular jurisdictions in which it arose. It forms the basis for the rules of law announced in *Restatement (2d) of Torts*, § 652C, cmt. b (1997) in *Competition Restatement* § 47, cmts. b & c, in McCarthy's seminal treatise on publicity rights, and in numerous cases. The Eighth Circuit's decision conflicts with the previously settled law governing game cases.

C. The Decision Below Cannot Be Reconciled With This Court's Precedent.

Finally, the Eighth Circuit's analysis is inconsistent with this Court's decision in *San Francisco Arts & Athletics*, 483 U.S. 522. That case involved a federal statute authorizing USOC to "prohibit certain commercial and promotional uses of the word 'Olympic.'" *Id.* at 524. SFAA, a group promoting the Gay Olympics, challenged this statute, claiming that granting USOC exclusive ownership rights in the word "Olympic" violated its First Amendment rights. The Court noted that "when a word acquires value 'as the result of organization and the expenditure of labor, skill, and money' by an entity, that entity constitutionally may obtain a limited property right in the word." *Id.* at 532 (internal quotation marks omitted). Because USOC's property right in the word Olympic was the result of such effort, the Court concluded, "Congress' decision to grant the USOC a limited property right in the word 'Olympic' falls within the scope of trademark protections, and thus certainly within constitutional bounds." *Id.* at 534-35.

In rejecting SFAA's argument that the statute would unconstitutionally limit commercial and political speech, this Court stated that "[t]o the extent that [the statute] applies to uses 'for the purpose of trade [or] to induce the sale of any goods or services,' its application is to commercial speech" which receives only "'a limited form of First Amendment protection.'" *Id.* at 535 (citations omitted) (alteration in original). The Court easily found that the limitations on commercial speech resulting from the enforcement of USOC's property right were "reasonable" and did not violate the First

Amendment.[6] Moreover, the Court upheld the property right despite its recognition that the SFAA's use of "Olympic" involved some "expressive, as opposed to . . . purely commercial" speech, saying that the SFAA did not have "a First Amendment right to 'appropriat[e] to itself the harvest of those who have sown.'" *Id.* at 541 (citation omitted) (alteration in original).

The same reasoning applies here. Because Missouri's decision to grant athletes an enforceable property right affects only commercial speech, and because CBC is using those rights predominantly for its commercial advantage, it does not violate the First Amendment to enforce the players' rights against CBC. The decision below is inconsistent with the analysis in *SFAA*.

II. THE APPROPRIATE LEGAL TEST FOR WEIGHING STATE-LAW PUBLICITY RIGHTS AND FIRST AMENDMENT INTERESTS IS A RECURRING AND IMPORTANT ISSUE.

Clearly the issue raised here is both recurring and important. At least 28 states enforce publicity rights; virtually every case seeking to enforce such rights meets a defense that to do so will violate the First Amendment. Moreover, a myriad of celebrities, athletes and professional organizations license publicity rights for commercial use, and actively

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[6] The dissent agreed with the majority that the statute was constitutional to the extent it limited commercial speech. *See San Francisco Arts* 483 U.S. at 561 (Brennan, J., dissenting) ("[t]he statute is overbroad on its face because it is susceptible of application to a substantial amount of *noncommercial* speech" (emphasis supplied)).

defend their interest in exclusive control over those rights. The issue is the frequent subject of litigation.

The breadth of the split and the attendant confusion are strong reasons to grant the petition. The current situation is unfair to both holders of publicity rights and those who seek to engage in commercial activity implicating such rights. A Missouri baseball player seeking to enforce his publicity rights would have prevailed under the predominant-purpose test in Missouri state court, but lost under the balancing test applied in federal court by the Eighth Circuit. A California celebrity will be able to enforce publicity rights that a Kentucky or Florida celebrity cannot. Forum shopping will be the inevitable result of the disparity in tests and outcomes.

Even more significantly, the federal rights embodied in the First Amendment have not received and will not receive uniform application and interpretation until this Court steps in to clarify the landscape. The lower courts are not moving towards uniformity; indeed the opposite is true, as tests proliferate. It is important that the First Amendment be consistently applied across the nation when balanced against state-law property rights, including rights in identity.

Moreover, the decision below is of substantial importance for another, more pragmatic reason. Based on the game cases and their routine citation in respected treatises and case law, individuals and businesses believed that celebrities and athletes have enforceable publicity rights in internet games, including fantasy games. In reliance on this authority, celebrities and athletes, and their authorized representatives, and businesses seeking to utilize their publicity rights entered into contracts

and established relationships based on the licensing of those rights. The decision in this case disrupts extant business and reliance interests in the billions of dollars.

This point is highlighted by the amicus participation in this case. In the Court of Appeals, amicus filings supporting the Association came from the International Licensing Industry Merchandiser's Association, the NFL Players Association and NFL Players Inc., NBA Properties, Inc., NHL Enterprises, LP, NFL Ventures, LP, National Association for Stock Car Auto Racing, Inc., PGA Tour, Inc, and WNBA Enterprises, LLC. As set forth in the Statement, *supra* at 8-9, fantasy-sports games providers have virtually all operated under licenses with athletes' representatives for years. This case has disrupted those reliance interests and thrown the industry into disarray.

This Court's guidance is urgently needed.

III. THE DECISION THAT THE FIRST AMENDMENT BARS ENFORCEMENT OF CBC'S NO-USE AND NO-CHALLENGE OBLIGATIONS CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

In its Licensing Agreements – signed after arms-length negotiation between sophisticated businesses – CBC *agreed* that Major League baseball players had specified identity rights that MLBPA owned, that CBC would *not use* the rights without a license, and that CBC would *not challenge* the rights either during or after the term of the Licensing Agreements. See *supra* at 11-12. CBC exploited the licensed rights for a decade, reaping significant benefits. But in the decision below, the majority held

that CBC could escape its contractual obligations, reasoning as follows: (i) the MLBPA warranted that it possessed certain player rights in § 8(a),[7] (ii) the MLBPA possessed but could not enforce those rights under the First Amendment, and (iii) thus, the warranty failed, and CBC was not required to fulfill its no-use and no-challenge obligations.[8] This decision is wrong and contradicts decisions of this Court and other courts of appeals.

Initially, because the Eighth Circuit's decision that the First Amendment barred enforcement of the Players' state-law right was wrong, this holding – premised on that error – is also wrong. But even assuming *arguendo* that the First Amendment prevented the MLBPA from enforcing players' identity rights, CBC was nonetheless free to enter into a contract agreeing that the players had identity rights that it would not use or challenge after the License expired. The First Amendment does not bar enforcement of contracts bargaining away or waiving First Amendment rights. The no-use and no-challenge provisions, accordingly, were wholly enforceable. As this Court explained in rejecting a First Amendment defense to enforcement of a reporter's promise not to disclose his source, the parties themselves "determine[d] the scope of their legal obligations, and any restrictions that may be placed on the publication of truthful information are

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[7] Section 8(a) states: "It is understood and agreed that MLBPA is the sole and exclusive holder of all right, title and interest in and to the Rights and/or Trademarks for the duration of this Agreement" (quoted at App. 14a).

[8] CBC never made this argument either in the trial court or on appeal, and it should have been deemed waived. App. 14a-15a (Colloton, J., dissenting).

self-imposed." *Cohen* v. *Cowles Media Co.*, 501 U.S. 663, 671 (1991).

In *Cohen*, the petitioner was a prominent political figure who offered to provide local newspapers, on the condition of confidentiality, with damaging information regarding a candidate of a rival political party. When, despite the promise of confidentiality, the newspapers published the petitioner's name as its source, the petitioner was fired by his employer; as a result, he sued the newspapers' publishers. This Court held that "the First Amendment does not confer on the press a constitutional right to disregard promises that would otherwise be enforced under state law." *Id.* at 672. In other words, the newspapers had bargained away their First Amendment rights. The same was true of CBC here; the no-use and no-challenge provisions waived any First Amendment right CBC had to exploit the players' identities commercially.

Numerous courts have held that contractual promises may waive First Amendment rights. See *Leonard* v. *Clark*, 12 F.3d 885, 889 (9th Cir. 1993); *Erie Telecomms., Inc.* v. *City of Erie*, 853 F.2d 1084, 1096 (3d Cir. 1988) ("constitutional rights, like rights and privileges of lesser importance, may be contractually waived where the facts and circumstances surrounding the waiver make it clear that the party foregoing its rights has done so of its own volition, with full understanding of the consequences of its waiver"); *Lake James Cmty. Volunteer Fire Dep't* v. *Burke County*, 149 F.3d 277, 280-82 (4th Cir. 1998) (enforcing contractual waiver of First Amendment right to challenge certain conduct); *Krystkowiak* v. *W.O. Brisben Cos.*, 90 P.3d 859, 865 (Colo. 2004) ("the First Amendment will not

protect people who have contracted away their First Amendment rights").

Under the Eighth Circuit's decision, the First Amendment invalidates contracts whose terms constitute limits on First Amendment rights. This Court should grant review to ensure that the rule of *Cohen* and other courts of appeals – that parties may bargain away First Amendment rights in this manner – is not contravened in this important setting.

The majority's decision allows CBC to escape its no-use and no-challenge commitments in its Licensing Agreements on the ground that the First Amendment voided the Association's granting of player rights. This holding is of exceptional importance because it calls into question the enforceability of provisions routinely included in licensing agreements. As Judge Posner has explained:

> Without [a no-contest provision] the licensee always has a club over the licensor's head: the threat that if there is a dispute the licensee will challenge [the intellectual property's] validity. The threat would discourage [intellectual property] licensing and might therefore retard rather than promote the diffusion of . . . works. Also, a no-contest clause might actually accelerate rather than retard challenges to invalid [intellectual property], by making the would-be licensee think hard about validity before rather than after he signed the licensing agreement." [*Saturday Evening Post*, 816 F.2d at 1200.]

Licenses routinely recite that the licensor has the rights it intends to license. If that assertion is invalid when a licensor cannot enforce its rights in light of

the First Amendment, then a licensor can never obtain a no-use or no-challenge provision that provides litigation peace or business certainty. The licensee can exploit the licensed rights at a price that reflects the no-use and no-challenge provisions, and then challenge the rights as defeated by the First Amendment. That is not good policy and it is not the law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MARY K. BRAZA
G. MICHAEL HALFENGER
FOLEY & LARDNER LLP
777 East Wisconsin Ave.
Milwaukee, WI 53202
(414) 271-2400

VIRGINIA A. SEITZ*
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

STEVEN A. FEHR
DONALD R. AUBRY
JOLLEY, WALSH, HURLEY
RAISHER & AUBRY, P.C.
204 West Linwood Blvd.
Kansas City, MO 64111
(816) 561-3755

RUSSELL S. JONES, JR.
TRAVIS A. SALMON
SHUGHART THOMSON
& KILROY, P.C.
120 West 12th Street
Kansas City, MO 64105
(816) 421-3355

Counsel for Petitioners

February 22, 2008

* Counsel of Record

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

[Filed: OCT. 16, 2007]

Nos. 06-3357, 06-3358

C.B.C. DISTRIBUTION AND MARKETING, INC.,
Plaintiff-Appellee,

v.

MAJOR LEAGUE BASEBALL ADVANCED MEDIA L.P.,
Defendant-Appellant,

THE MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,
Intervenor-Appellant.

NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, NATIONAL FOOTBALL LEAGUE PLAYERS, INC.; NBA PROPERTIES, INC.; NHL ENTERPRISES, L.P.: NFL VENTURES, L.P.; NATIONAL ASSOCIATION FOR STOCK CAR AUTO RACING, INC.; PGA TOUR, INC.; WNBA ENTERPRISES, LLC; INTERNATIONAL LICENSING INDUSTRY MERCHANDISERS' ASSOCIATION, INC.,
Amici on behalf of Appellants.

Submitted: June 14, 2007
Filed: Oct. 16, 2007
Rehearing and Rehearing En Banc
Denied Nov. 26, 2007.

Before LOKEN, *Chief Judge*, ARNOLD and COLLOTON, *Circuit Judges*.

ARNOLD, Circuit Judge.

C.B.C. Distribution and Marketing, Inc., brought this action for a declaratory judgment against Major League Baseball Advanced Media, L.P., to establish its right to use, without license, the names of and information about major league baseball players in connection with its fantasy baseball products. Advanced Media counterclaimed, maintaining that CBC's fantasy baseball products violated rights of publicity belonging to major league baseball players and that the players, through their association, had licensed those rights to Advanced Media, the interactive media and Internet company of major league baseball. The Major League Baseball Players Association intervened in the suit, joining in Advanced Media's claims and further asserting a breach of contract claim against CBC. The district court granted summary judgment to CBC, *see C.B.C. Distrib. and Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F.Supp.2d 1077 (E.D.Mo.2006), and Advanced Media and the Players Association appealed. We affirm.

I.

CBC sells fantasy sports products via its Internet website, e-mail, mail, and the telephone. Its fantasy baseball products incorporate the names along with performance and biographical data of actual major league baseball players. Before the commencement of the major league baseball season each spring, participants form their fantasy baseball teams by "drafting" players from various major league baseball teams. Participants compete against other fantasy baseball "owners" who have also drafted their own teams. A participant's success, and his or her team's success, depends on the actual performance of the fantasy team's players on their respective actual teams during the course of the major league baseball

season. Participants in CBC's fantasy baseball games pay fees to play and additional fees to trade players during the course of the season.

From 1995 through the end of 2004, CBC licensed its use of the names of and information about major league players from the Players Association pursuant to license agreements that it entered into with the association in 1995 and 2002. The 2002 agreement, which superseded in its entirety the 1995 agreement, licensed to CBC "the names, nicknames, likenesses, signatures, pictures, playing records, and/or biographical data of each player" (the "Rights") to be used in association with CBC's fantasy baseball products.

In 2005, after the 2002 agreement expired, the Players Association licensed to Advanced Media, with some exceptions, the exclusive right to use baseball players' names and performance information "for exploitation via all interactive media." Advanced Media began providing fantasy baseball games on its website, MLB.com, the official website of major league baseball. It offered CBC, in exchange for a commission, a license to promote the MLB.com fantasy baseball games on CBC's website but did not offer CBC a license to continue to offer its own fantasy baseball products. This conduct by Advanced Media prompted CBC to file the present suit, alleging that it had "a reasonable apprehension that it will be sued by Advanced Media if it continues to operate its fantasy baseball games."

The district court granted summary judgment to CBC. It held that CBC was not infringing any state-law rights of publicity that belonged to major league baseball players. *C.B.C.*, 443 F.Supp.2d at 1106-07. The court reasoned that CBC's fantasy baseball products did not use the names of major league

baseball players as symbols of their identities and with an intent to obtain a commercial advantage, as required to establish an infringement of a publicity right under Missouri law (which all parties concede applies here). *Id.* at 1085-89. The district court further held that even if CBC were infringing the players' rights of publicity, the first amendment preempted those rights. *Id.* at 1091-1100. The court rejected, however, CBC's argument that federal copyright law preempted the rights of publicity claim. *Id.* at 1100-03. Finally, the district court held that CBC was not in violation of the no-use and no-contest provisions of its 2002 agreement with the Players Association because "the strong federal policy favoring the full and free use of ideas in the public domain as manifested in the laws of intellectual property prevails over [those] contractual provisions" (internal quotations omitted). *Id.* at 1106-07.

Because this appeal is from the district court's grant of summary judgment, our review is *de novo,* and we apply "the same standards as the district court and view[ ] the evidence in the light most favorable to the nonmoving party." *Travelers Prop. Cas. Co. of Am. v. General Cas. Ins. Co.* 465 F.3d 900, 903 (8th Cir.2006). Summary judgment is appropriate only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett* 477, U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). We also review *de novo* the district court's interpretation of state law, including its interpretation of Missouri law regarding the right of publicity. *See Hammer v. City of Osage Beach,* 318 F.3d 832, 841 (8th Cir.2003). When state law is ambiguous, we must "predict how the highest court of that state would resolve the issue." *Clark v. Kellogg Co.*, 205 F.3d 1079, 1082 (8th Cir.2000).

II.

A.

An action based on the right of publicity is a state-law claim. *See Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 566, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977). In Missouri, "the elements of a right of publicity action include: (1) That defendant used plaintiff's name as a symbol of his identity (2) without consent (3) and with the intent to obtain a commercial advantage." *Doe v. TCI Cablevision*, 110 S.W.3d 363, 369 (Mo.2003), *cert. denied* 540 U.S. 1106, 124 S.Ct. 1058, 157 L.Ed.2d 892 (2004). The parties all agree that CBC's continued use of the players' names and playing information after the expiration of the 2002 agreement was without consent. The district court concluded, however, that the evidence was insufficient to make out the other two elements of the claim, and we address each of these in turn.

With respect to the symbol-of-identity element, the Missouri Supreme Court has observed that "'the name used by the defendant must be understood by the audience as referring to the plaintiff.'" The state court had further held that "[i]n resolving this issue, the fact-finder may consider evidence including 'the nature and extent of the identifying characteristics used by the defendant, the defendant's intent, the fame of the plaintiff, evidence of actual identification made by third persons, and surveys or other evidence indicating the perceptions of the audience.'" *Doe,* 110 S.W.3d at 370 (quoting Restatement (Third) of Unfair Competition § 46 cmt. d).

Here, we entertain no doubt that the players' names that CBC used are understood by it and its

fantasy baseball subscribers as referring to actual major league baseball players. CBC itself admits that: In responding to the appellants' argument that "this element is met by the mere confirmation that the name used, in fact, refers to the famous person asserting the violation," CBC stated in its brief that "if this is all the element requires, CBC agrees that it is met." We think that by reasoning that "identity," rather than "mere use of a name," "is a critical element of the right of publicity," the district court did not understand that when a name alone is sufficient to establish identity, the defendant's use of that name satisfies the plaintiff's burden to show that a name was used as a symbol of identity.

It is true that with respect to the "commercial advantage" element of a cause of action for violating publicity rights, CBC's use does not fit neatly into the more traditional categories of commercial advantage, namely, using individuals' names for advertising and merchandising purposes in a way that states or intimates that the individuals are endorsing a product. *Cf.* Restatement (Third) of Unfair Competition § 47 cmt. a, b. But the Restatement, which the Missouri Supreme Court has recognized as authority in this kind of case, *see Doe*, 110 S.W.3d at 368, also says that a name is used for commercial advantage when it is used "in connection with services rendered by the user" and that the plaintiff need not show that "prospective purchasers are likely to believe" that he or she endorsed the product or service. Restatement (Third) of Unfair Competition § 47 & cmt. a. We note, moreover, that in Missouri, "the commercial advantage element of the right of publicity focuses on the defendant's intent or purpose to obtain a commercial benefit from use of the plaintiff's identity." *Doe*, 110 S.W.3d at 370-71. Because we

think that it is clear that CBC uses baseball players' identities in its fantasy baseball products for purposes of profit, we believe that their identities are being used for commercial advantage and that the players therefore offered sufficient evidence to make out a cause of action for violation of their rights of publicity under Missouri law.

B.

CBC argues that the first amendment nonetheless trumps the right-of-publicity action that Missouri law provides. Though this dispute is between private parties, the state action necessary for first amendment protections exists because the right-of-publicity claim exists only insofar as the courts enforce state-created obligations that were "never explicitly assumed" by CBC. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 668, 111 S.Ct. 2513, 115 L.Ed.2d 586 (1991).

The Supreme Court has directed that state law rights of publicity must be balanced against first amendment considerations, *see Zacchini v. Scripps-Howard Broad.*, 433 U.S. 562, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977), and here we conclude that the former must give way to the latter. First, the information used in CBC's fantasy baseball games is all readily available in the public domain, and it would be strange law that a person would not have a first amendment right to use information that is available to everyone. It is true that CBC's use of the information is meant to provide entertainment, but "[s]peech that entertains, like speech that informs, is protected by the First Amendment because '[t]he line between the informing and the entertaining is too elusive for the protection of that basic right.'" *Cardtoons, L.C. v. Major League*

Baseball Players Ass'n, 95 F.3d 959, 969 (10th Cir.1996) (quoting *Winters v. New York,* 333 U.S. 507, 510, 68 S.Ct. 665, 92 L.Ed. 840 (1948)); *see also Zacchini* 433 U.S. at 578, 97 S.Ct. 2849. We also find no merit in the argument that CBC's use of players' names and information in its fantasy baseball games is not speech at all. We have held that "the pictures, graphic design, concept art, sounds, music, stories, and narrative present in video games" is speech entitled to first amendment protection. *See Interactive Digital Software Ass'n v. St. Louis County, Mo.,* 329 F.3d 954, 957 (8th Cir.2003). Similarly, here CBC uses the "names, nicknames, likenesses, signatures, pictures, playing records, and/or biographical data of each player" in an interactive form in connection with its fantasy baseball products. This use is no less expressive than the use that was at issue in *Interactive Digital.*

Courts have also recognized the public value of information about the game of baseball and its players, referring to baseball as "the national pastime." *Cardtoons,* 95 F.3d at 972. A California court, in a case where Major League Baseball was itself defending its use of players' names, likenesses, and information against the players' asserted rights of publicity, observed, "Major league baseball is followed by millions of people across this country on a daily basis . . . The public has an enduring fascination in the records set by former players and in memorable moments from previous games The records and statistics remain of interest to the public because they provide context that allows fans to better appreciate (or deprecate) today's performances." *Gionfriddo v. Major League Baseball,* 94 Cal.App.4th 400, 411, 114 Cal.Rptr.2d 307 (2001). The Court in *Gionfriddo* concluded that the

"recitation and discussion of factual data concerning the athletic performance of [players on Major League Baseball's website] command a substantial public interest, and, therefore, is a form of expression due substantial constitutional protection." *Id.* We find these views persuasive.

In addition, the facts in this case barely, if at all, implicate the interests that states typically intend to vindicate by providing rights of publicity to individuals. Economic interests that states seek to promote include the right of an individual to reap the rewards of his or her endeavors and an individual's right to earn a living. Other motives for creating a publicity right are the desire to provide incentives to encourage a person's productive activities and to protect consumers from misleading advertising. *See Zacchini* 433 U.S. at 573, 576, 97 S.Ct. 2849; *Cardtoons,* 95 F.3d at 973. But major league baseball players are rewarded, and handsomely, too, for their participation in games and can earn additional large sums from endorsements and sponsorship arrangements. Nor is there any danger here that consumers will be misled, because the fantasy baseball games depend on the inclusion of all players and thus cannot create a false impression that some particular player with "star power" is endorsing CBC's products.

Then there are so-called non-monetary interests that publicity rights are sometimes thought to advance. These include protecting natural rights, rewarding celebrity labors, and avoiding emotional harm. *See Cardtoon* 95 F.3d at 973. We do not see that any of these interests are especially relevant here, where baseball players are rewarded separately for their labors, and where any emotional harm would most likely be caused by a player's actual

performance, in which case media coverage would cause the same harm. We also note that some courts have indicated that the right of publicity is intended to promote only economic interests and that noneconomic interests are more directly served by so-called rights of privacy. *See, e.g., id.* at 967; *Gionfriddo* 94 Cal.App.4th at 409, 114 Cal.Rptr.2d 307 (2001); *see also Haelan Laboratories v. Topps Chewing Gum* 202 F.2d 866, 868 (2d Cir.1953). For instance, although the court in *Cardtoons* 95 F.3d at 975-76, conducted a separate discussion of non-economic interests when weighing the countervailing rights, it ultimately concluded that the non-economic justifications for the right of publicity were unpersuasive as compared with the interest in freedom of expression. "Publicity rights . . . are meant to protect against the loss of financial gain, not mental anguish." *Id.* at 976. We see merit in this approach.

Because we hold that CBC's first amendment rights in offering its fantasy baseball products supersede the players' rights of publicity, we need not reach CBC's alternative argument that federal copyright law preempts the players' state law rights of publicity.

III.

We come finally to the breach of contract issue. The 2002 contract between the Players Association and CBC specifically provided: "It is understood and agreed that [the Players Association] is the sole and exclusive holder of all right, title and interest in and to the Rights." CBC undertook not to "dispute or attack the title or any rights of Players' Association in and to the Rights and/or the Trademarks or the validity of the license granted," either during or after the expiration of the agreement (the no-challenge

provision). CBC also agreed that, upon expiration or termination of the contract, it would "refrain from further use of the Rights and/or the Trademarks or any further reference to them, either directly or indirectly" (the no-use provision). The Players Association maintains that the no-challenge and no-use provisions of the 2002 agreement are fatal to CBC's claim. We disagree.

In holding the no-use and no-challenge provisions unenforceable as against public policy, the district court applied a Supreme Court decision dealing with patents. In that case, the Supreme Court held that the doctrine of licensee estoppel (under which a licensee is estopped from contesting the validity of its license, *see Idaho Potato Comm'n v. M & M Produce Farm & Sales* 335 F.3d 130, 135 (2d Cir.2003), *cert. denied* 541 U.S. 1027, 124 S.Ct. 2066, 158 L.Ed.2d 642 (2004)), must give way when the "strong federal policy favoring the full and free use of ideas in the public domain" contained in federal patent law outweighs the "competing demands of contract law." *Lear, Inc. v. Adkins* 395 U.S. 653, 674, 675, 89 S.Ct. 1902, 23 L.Ed.2d 610 (1969). The *Lear* balancing approach has been applied to other areas of federal intellectual property law, *see Idaho Potato,* 335 F.3d at 137-39 (certification marks); *Beer Nuts, Inc. v. King Nut Co.,* 477 F.2d 326, 328-29 (6th Cir.1973), *cert. denied,* 414 U.S. 858, 94 S.Ct. 66, 38 L.Ed.2d 108 (1973) (trademarks); *see also Saturday Evening Post Co. v. Rumbleseat Press, Inc.,* 816 F.2d 1191, 1200-01 (7th Cir.1987) (copyright). The district court's application of the *Lear* principles to a state law right-of-publicity action, however, was unique so far as we can determine.

We do not reach the issue of whether *Lear* is applicable here, though, because we believe that the

contested contract terms are unenforceable for a different reason. We first note that in its brief, CBC argued that it should be relieved of its no-use and no-challenge obligations because the Players Association breached a warranty contained in § 1(b) of the 2002 agreement. Section 1(b) of the agreement provides that "[the Players Association] represents and warrants that it has the authority to grant the rights licensed herein." CBC argued that this was a warranty of title in the players' publicity rights and that the Players Association breached this warranty, either because the players did not have publicity rights or because CBC's first amendment rights superseded any such publicity rights. We find this argument meritless: Section 1(b) is not a warranty of title, it is merely a warranty that the Players Association is the agent of the players. That warranty was not breached.

Although the parties did not cite to it in their briefs, the agreement does contain what we believe is a warranty of title not in § 1(b), but in § 8(a). The agreement provides that its interpretation will be governed by New York law. In New York, a contractual warranty is defined as "'an assurance by one party to a contract of the existence of a fact upon which the other party may rely.'" *CBS Inc. v. Ziff-Davis Publ'g Co.*, 75 N.Y.2d 496, 503, 554 N.Y.S.2d 449, 553 N.E.2d 997, 1000 (1990) (quoting *Metropolitan Coal Co. v. Howard* 155 F.2d 780, 784 (2d Cir.1946) (Hand, J.)). Section 8(a) of the agreement provides that the Players Association "is the sole and exclusive holder of all right, title and interest" in and to the names and playing statistics of virtually all major league baseball players. This is quite obviously a representation or warranty that the Players Association did in fact own the state law

publicity rights at issue here. For the reasons given above, the Players Association did not have exclusive "right, title and interest" in the use of such information, and it therefore breached a material obligation that it undertook in the contract. CBC is thus relieved of the obligations that it undertook, and the Players Association cannot enforce the contract's no-use and no-challenge provisions against CBC.

IV.

For the foregoing reasons, the district court's grant of summary judgment to CBC is affirmed.

COLLOTON, *Circuit Judge*, dissenting.

I agree with the court's discussion of the right of publicity in Missouri and the application of the First Amendment in this context. I would resolve the contractual issues differently, however, and I therefore respectfully dissent.

Advanced Media and the Major League Baseball Players Association ("MLBPA") contend that CBC has violated two provisions of the applicable License Agreement as set forth in the majority opinion-the "no-challenge" provision and the "no-use" provision. CBC does not really dispute that it violated the restrictions, but it contends that the contractual provisions are unenforceable. I disagree with the court's conclusion, *sua sponte* that the provisions are unenforceable because MLBPA breached a warranty set forth in section 8(a) of the agreement.

Section 8(a) appears under a heading "Ownership of Rights." It provides as follows: "It is understood and agreed that MLBPA is the sole and exclusive holder of all right, title and interest in and to the Rights and/or Trademarks for the duration of this Agreement." Given the court's resolution of issues concerning the right of publicity and the First Amendment, section 8(a) wins the day for CBC only if it is a warranty by MLBPA that CBC does not have rights under the First Amendment to use the players' names and statistics in its fantasy baseball games.

Assuming that section 8(a) does address CBC's constitutional rights (as opposed merely to the players' state-law rights of publicity, which are accurately represented), and assuming that one party's prediction about the constitutional rights of another party is the sort of "fact" that can be warranted under New York law, section 8(a) does not

purport to make such a warranty. The provision states that the parties "agree" that MLPBA is the sole and exclusive holder of all right, title and interest in and to the Rights. CBC surely can "agree," as a matter of good business judgment, to bargain away any uncertain First Amendment rights that it may have in exchange for the certainty of what it considers to be an advantageous contractual arrangement. *See Paragould Cablevision v. City of Paragould,* 930 F.2d 1310 1315 (8th Cir.1991). That CBC later decided it did not need a license, and that it preferred instead to litigate the point, does not relieve the company of its contractual obligation. *See Heath v. A.B. Dick Co.,* 253 F.2d 30, 34-35 (7th Cir.1958).

I also do not believe the district court's grant of summary judgment invalidating the no-use and no-contest provisions can be sustained on the grounds actually raised by CBC. I agree with the court that MLBPA has not breached the warranty set forth in section 1(b) of the agreement. And I would not adopt the district court's conclusion that the Supreme Court's decision in *Lear, Inc. v. Adkins* 395 U.S. 653, 89 S.Ct. 1902, 23 L.Ed.2d 610 (1969), should be applied to declare the no-use and no-contest provisions unenforceable as against public policy. *Lear* held that state contract law establishing the doctrine of licensee estoppel in a patent case was preempted where its enforcement would significantly frustrate "overriding federal policies" embodied in the federal patent laws. The *Lear* approach to preemption has been extended only to areas where there are comparable federal policies derived from federal statutes that justify the preemption of state law. In this case, there is no federal statute that addresses state-law contract obligations with respect

to the right of publicity, and no indication that Congress sought to abrogate contracts in this area that are otherwise enforceable under state law. I would not fashion a rule of federal common law that abrogates these freely negotiated contractual provisions. *See Saturday Evening Post Co. v. Rumbleseat Press, Inc.A* 816 F.2d 1191, 1200 (7th Cir.1987).

For these reasons, I would reverse the district court's grant of summary judgment in favor of CBC.

APPENDIX B

UNITED STATES DISTRICT COURT
E.D. MISSOURI
EASTERN DIVISION

No. 4:05CV00252MLM

C.B.C. DISTRIBUTION AND MARKETING, INC.,
Plaintiff / Counter Defendant,

v.

MAJOR LEAGUE BASEBALL ADVANCED MEDIA, L.P.,
Defendant / Counter Claimant,

and MAJOR LEAGUE BASEBALL PLAYERS' ASSOCIATION,
Intervenor / Counter Claimant.

Aug. 8, 2006

MEMORANDUM OPINION

MEDLER, *United States Magistrate Judge.*

Before the court are the Motion for Summary Judgment filed by Intervenor/Counter Claimant Major League Baseball Players Association (the "Players' Association"), Doc. 44, the Motions for Summary Judgment filed by Plaintiff/Counter Defendant C.B.C. Distribution and Marketing, Inc. ("CBC"), Doc. 72, Doc. 107, and the Motion for Summary Judgment filed by Defendant/Counter Claimant Major League Baseball Advanced Media, L.P., ("Advanced Media"), Doc. 87. The Fantasy Sports Trade Association has filed an Amicus Brief. Doc. 76. The parties have filed Responses and Replies to the various Motions

for Summary Judgment.[1] The parties have consented to the jurisdiction of the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(c)(1). Doc. 13.

I.

BACKGROUND AND UNDISPUTED FACTS[2]

The Players' Association is the bargaining representative for Major League baseball players and is

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[1] Document 74 is CBC's Response to the Players' Association's Motion for Summary Judgment, Document 44. Document 74 is also a Memorandum in Support of CBC's Motion for Summary Judgment against the Players' Association, Document 72. Document 105 is CBC's Memorandum in Support of its Motion for Summary Judgment against Advanced Media, Document 107. Document 105 is also CBC's Response to Advanced Media's Motion for Summary Judgment, Document 87, and a Reply in support of CBC's Motion for Summary Judgment against the Players' Association, Document 72. Document 111 is the Players' Association's Response to the Amicus Brief filed by the Fantasy Sports Trade Association, Document 76. Document 111 is also the Players' Association's Reply in support of its Motion for Summary Judgment against CBC, Document 44, and a Response to CBC's Motion for Summary Judgment against the Players' Association, Document 72. Document 119 is Advanced Media's Response to CBC's Motion for Summary Judgment against Advanced Media, Document 107, and is also Advanced Media's Reply in support of its Motion for Summary Judgment against CBC, Document 87. Document 124 is CBC's Reply in support of its Motion for Summary Judgment against Advanced Media, Document 107.

[2] The facts as stated above are undisputed unless otherwise stated. The court notes that the parties have filed statements of fact in support of their respective motions for summary judgment and that upon responding to these facts each of the parties has denied the truth of numerous facts. The facts which are disputed, however, are not relevant to this court's determination of the issues before it.

comprised of almost all persons who are employed as Major League baseball players. Advanced Media was formed in 2000 by various owners of Major League Baseball teams to serve as the interactive media and internet arm of Major League Baseball. As part of its responsibilities Advanced Media is in charge of running Major League Baseball's internet site, MLB.com.

CBC, which uses the trade name CDM Fantasy Sports, is a Missouri corporation whose primary offices are located in St. Louis, Missouri. CBC markets, distributes and sells fantasy sports products, including fantasy baseball games accessible over the Internet. To date, the business of fantasy sports games is a multimillion dollar industry in the United States.

CBC offers its fantasy sports products via telephone, mail, e-mail, and the Internet through its website, www.CDMsports.com. CBC currently offers eleven fantasy baseball games, two mid-season fantasy baseball games, and one fantasy baseball playoff game. CBC provides lists of Major League baseball players for selection by participants in its games. Game participants pay fees to CBC to play its games and pay additional amounts to trade players.[3] Prior to the start of the professional baseball season participants form their teams by "drafting" players from various Major League baseball teams. Participants or "owners" compete against other fantasy owners who have drafted their own teams. The success of one's fantasy team over the

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[3] CBC's most popular fantasy baseball game is called Diamond Challenge, in which game customers are charged a transaction fee every time they make a trade.

course of the baseball season is dependent on one's chosen players' actual performances on their respective actual teams.

In addition to fantasy sports games, CBC's website provides up-to-date information on each player to assist game participants in selecting players for and trading players on their fantasy teams.[4] This information includes information which is typically found in box scores in newspapers such as players' batting averages, at bats, hits, runs, doubles, triples, home runs, etc. *See* CBC's Ex. 16E, attached hereto. CBC also hires journalists to write stories relevant to fantasy owners, such as the latest injury reports, player profiles, and player reports.

CBC entered into license agreements with the Players' Association covering the period from July 1, 1995, through December 31, 2004 (the "1995 and 2002 License Agreements" or the "Agreements"). Doc. 44, Ex. B 1 and B2. The 2002 License Agreement stated that it "represents the entire understanding between the parties and supercedes all previous representations." The court, therefore, need only address the terms of the 2002 License Agreement. The 2002 License Agreement stated that the Players' Association was acting on behalf of all the active baseball players of the National League and the American League who entered into a Commercial Authorization Agreement with the Players' Association; that the Players' Association in this capacity had the right to negotiate the Agreements and to grant rights in and to the logo, name, and symbol of

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[4] One does not have to be a customer of CBC or a game participant to obtain the statistics which CBC provides on its website.

the Players' Association, identified as the Trademarks, and "the names, nicknames, likenesses, signatures, pictures, playing records, and/or biographical data of each player," identified as the "Players' Rights"; and that CBC desired to use the "Rights and/or the Trademarks on or in association with the manufacture, offering for sale, sale, advertising, promotion, and distribution of certain products (the 'Licensed Products')."

The 2002 License Agreement included a no-challenge provision which provided that "during any License Period . . . [CBC] will not dispute or attack the title or any rights of Players' Association in and to the Rights and/or the Trademarks or the validity of the license granted." The 2002 License Agreement further stated that upon termination CBC would have no right ". . . to use in any way the Rights, the Trademarks, or any Promotional Material relating to the Licensed Products" and that upon expiration or termination of the License Agreement, CBC shall "refrain from further use of the Rights and/or the Trademarks or any further reference to them, either directly or indirectly . . . ."

Between 2001 and January 2004, Advanced Media offered fantasy baseball games on MLB.com without obtaining a license and without obtaining permission from the Players' Association.

In 2005, Advanced Media entered into an agreement (the "Advanced Media License Agreement") with the Players' Association whereby the Players' Association granted to Advanced Media a license to use "Rights and Trademarks for exploitation via all interactive media," with some exclusions.

On or around January 19, 2005, Advanced Media executive George Kliavkoff sent a request for proposals (the "RFP") to various fantasy game operators and providers including CBC. The RFP invited CBC to submit a proposal under which it would enter into a license agreement with Advanced Media and participate in Advanced Media's fantasy baseball licensing program for the 2005 season.

On February 4, 2005, Advanced Media offered CBC a license to promote Advanced Media's fantasy baseball games on CBC's website in exchange for a percentage share of all related revenue. Doc. 74, Ex. 4N. In particular, Advanced Media stated that it was offering "a full suite of MLB fantasy games" and that CBC could use its "online presence and customer relationships, in conjunction with [Major League Baseball's] marks, to promote the MLB.com fantasy games to [CBC's] customers in exchange for a 10% revenue share from MLB.com on all related revenue." As such, Advanced Media was not offering CBC "a license to promote its own MLB fantasy game for the 2005 season." Doc. 74, Ex. 4N.

On February 7, 2005, CBC filed the Complaint for declaratory judgment in the matter under consideration in which it alleges that it has a reasonable apprehension that it will be sued by Advanced Media if it continues to operate its fantasy baseball games. The Complaint further alleges that Advanced Media has maintained that it has exclusive ownership of statistics associated with players' names and that it can, therefore, preclude all fantasy sports league providers from using this statistical information to provide fantasy baseball games to the consuming

public.[5] CBC also seeks injunctive relief asking that Advanced Media and its affiliates be enjoined from interfering with CBC's business related to sports fantasy teams. Doc. 1.

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[5] Count III of CBC's Complaint addressed the right of publicity. CBC also sought declaratory judgment in Count I, pursuant to the Lanham Act, 15 U.S.C. § 1051 et seq., in Count II, pursuant to copyright law, and in Count IV, pursuant to state unfair competition or false advertising laws. Advanced Media filed counterclaims alleging violations of state trademark and unfair competition laws, state false advertising laws, and the Lanham Act. The parties have entered into a Stipulation pursuant to which CBC dismissed Counts I, II, and IV of its Complaint and pursuant to which Advanced Media dismissed its counterclaims alleging violations of state trademark and unfair competition laws, state false advertising laws, and the Lanham Act. Doc. 126.

The only count remaining in CBC's Complaint is its allegations regarding the right of publicity which, as discussed below, is a matter of state and common law. Because the federal claims have been dismissed, the court has the discretion to decline to exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367(c)(3). The parties have stipulated that the court can and should retain subject matter jurisdiction pursuant to 28 U.S.C. § 1367(a). Doc. 126. The court has considered that the parties' Stipulation dismissing Counts I, II, and IV comes late in the progress of this case, has considered generally accepted principles of judicial economy, convenience and fairness to the litigants, and has determined that the court will retain supplemental jurisdiction over the claims remaining in this matter. The court notes that CBC's affirmative defenses of copyright preemption and the First Amendment do not affect the jurisdictional issue. *See Cardtoons, L.C., v. Major League Baseball Players Ass'n*, 95 F.3d 959, 964 (10th Cir.1996) (holding that in a declaratory judgment action "[i]t is the character of the impending action, not the plaintiff's defense, that determines whether there is federal question jurisdiction") (citation omitted).

Advanced Media and the Players' Association, the latter of which intervened in this matter, assert counterclaims, including a contract violation based on the 2002 License Agreement between the Players' Association and CBC. Advanced Media and the Players' Association further assert as a counterclaim that CBC violated the players' right of publicity based on CBC's exploiting the rights of players including their names, nicknames, likenesses, signatures, jersey numbers, pictures, playing records and biographical data (the "Player Rights") via all interactive media with respect to fantasy baseball games. Advanced Media and the Players' Association also seek injunctive relief and exemplary and punitive damages. Doc. 7.

Because the claims and counterclaims asserted in the parties' pleadings and arguments in some, but not all, of the summary judgment briefs are considerably broader than the use of players' names and statistics, the court requested a teleconference with the parties to clarify the precise scope of the matters at issue. On the record, in a teleconference of May 24, 2006, CBC clarified that when it speaks of statistics it is referring to players' names and performance records, also referenced as players' playing records or players' records; "player[s'] names plus their performance records are the only thing[s] at issue in this litigation." Doc. 129 at 6, 9. Additionally, the Players' Association and Advanced Media clarified that they are not claiming that CBC cannot use players' playing records or biographical data; that they are challenging CBC's use of players' names in conjunction with its fantasy baseball games; that they are claiming that the identities of players are represented by their names; that they are concerned with protecting the players' names; and that they are

claiming that CBC uses players' names in its fantasy baseball games in violation of the players' right of publicity. Doc. 129 at 8, 13. Also, in the teleconference CBC stated that its position is that players' names and playing records, as used in its fantasy baseball games, are preempted by copyright law; that CBC's use of players' names and playing records in its fantasy baseball games does not violate the players' claimed right of publicity; and that even assuming, arguendo, that CBC's use of players' names and playing records violates the players' right of publicity, the First Amendment controls. Doc. 129 at 6.

Thus, the only remaining issues before this court are whether the players have a right of publicity in their names and playing records as used in CBC's fantasy games; whether, if the players have such a right, CBC has, and is, violating the players' claimed right of publicity; whether, if the players have a right of publicity and if this right has been violated by CBC, such a violation is preempted by copyright law; whether, if the players have a right of publicity which has been violated by CBC, the First Amendment applies and, if so, whether it takes precedence over the players' claimed right of publicity; and whether CBC has breached the 2002 Licensing Agreement.

II.

STANDARD FOR SUMMARY JUDGMENT

The court may grant a motion for summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

Fed.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The substantive law determines which facts are critical and which are irrelevant. Only disputes over facts that might affect the outcome will properly preclude summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Summary judgment is not proper if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id. See also Fenney v. Dakota, Minn. & E.R.R. Co.*, 327 F.3d 707, 711 (8th Cir.2003)(holding that an issue is genuine "if the evidence is sufficient to allow a reasonable jury to return a verdict for the nonmoving party").

A moving party always bears the burden of informing the court of the basis of its motion. *Celotex*, 477 U.S. at 323, 106 S.Ct. 2548. Once the moving party discharges this burden, the nonmoving party must set forth specific facts demonstrating that there is a dispute as to a genuine issue of material fact, not the "mere existence of some alleged factual dispute." Fed.R.Civ.P. 56(e); *Anderson*, 477 U.S. at 247, 106 S.Ct. 2505. The nonmoving party may not rest upon mere allegations or denials of his pleading. *Anderson*, 477 U.S. at 256, 106 S.Ct. 2505.

In passing on a motion for summary judgment, the court must view the facts in the light most favorable to the nonmoving party and all justifiable inferences are to be drawn in its favor. *Id.* at 255, 106 S.Ct. 2505; *Raschick v. Prudent Supply, Inc.*, 830 F.2d 1497, 1499 (8th Cir.1987). The court's function is not to weigh the evidence, but to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249, 106 S.Ct. 2505. However, "[t]he mere

existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient." *Id.* at 252, 106 S.Ct. 2505. With these principles in mind, the court turns to an analysis of the pending motions for summary judgment.

III.

APPLICABLE LAW AND DISCUSSION

The court will first determine whether the undisputed facts of this case establish that CBC has violated the players' claimed right of publicity. Only if that right is violated need the court consider whether under the facts of this case federal copyright law preempts the right of publicity and/or whether the First Amendment trumps the right of publicity. *See Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 161, 109 S.Ct. 971, 103 L.Ed.2d 118 (1989) (holding that state laws must yield to federal law when the former "pose[s] a substantial threat to [federal law's] ability to accomplish its mission"). Nevertheless, the court will discuss each of the issues raised by the parties.

A. Right of Publicity:[6]

The Players' Association and Advanced Media both contend that CBC has violated the players' right of publicity, which right is a creature of state and common law. *See e.g., Zacchini v. Scripps-Howard Broadcasting, Co.*, 433 U.S. 562, 566, 97 S.Ct. 2849, 53 L.Ed.2d 965 (1977); *Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo.2003) (en banc), *cert denied*, 540 U.S. 1106, 124 S.Ct. 1058,

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[6] Sources, including case law and treatises, refer to this right as both the "right to publicity" and "the right of publicity." This decision, therefore, reflects such references.

157 L.Ed.2d 892 (2004), *appeal after remand*, 2006 WL 1677856, 207 S.W.3d 52 (Mo.App.2006); *Gionfriddo v. Major League Baseball*, 94 Ca.App. 4th 400, 408, 114 Cal.Rptr.2d 307 (Cal.Ct. App.2001).

The right of publicity is recognized by statute and/or common law in many states.[7] J. Thomas McCarthy, The Right of Publicity and Privacy § 63 (2d ed.2005). Among those states recognizing the right of publicity is Missouri. *TCI*, 110 S.W.3d at 368.[8] A fairly recent concept, according to the Sixth Circuit in *ETW Corporation v. Jireh Publishing, Inc.*, 332 F.3d 915, 929 (6th Cir.2003), this right "was first recognized in *Haelan Laboratories, Inc. v. Topps Chewing Gum. Inc.*, 202 F.2d 866 (2nd Cir.1953), where the Second Circuit held that New York's

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[7] According to John Grady, Steve McKelvey and Annie Clement, *A New Twist for the Home Guys?: An Analysis of the Right of Publicity Versus Parody*, 15 J. Legal Aspects of Sport 267, 271 (2005), twenty-eight states recognize the right of publicity.

[8] In *TCI* a former professional hockey player known as Tony Twist brought suit regarding a comic book titled *Spawn* which included a character named "Anthony 'Tony Twist' Twistelli." 110 S.W.3d at 365-66. The jury found in favor of the real Tony Twist and awarded him $24.5 million dollars. The trial court entered a judgment notwithstanding the verdict on the grounds that Twist had not made a submissible case. On appeal, the Missouri Supreme Court concluded that Twist had in fact made a submissible case. The court, however, remanded the matter based on an instructional error. Upon retrial, the jury awarded Twist $15 million dollars. The defendants filed an appeal asserting, among other things, that their use of Twist's name was protected speech under the First Amendment. The Missouri Court of Appeals, Eastern District affirmed the judgment of the trial court. *Doe v. McFarlane*, 2006 WL 1677856, 207 S.W.3d 52 (Mo.Ct.App.2006).

common law protected a baseball player's right in the publicity value of his photograph, and, in the process, coined the phrase 'right of publicity' as the name of this right." Subsequently, in *Zacchini,* 433 U.S. at 573, 97 S.Ct. 2849, where a performer in a "human cannonball" act sought to recover damages from a television broadcast of his entire performance, the Supreme Court recognized that the right of publicity protects the proprietary interest of an individual to "reap the reward of his endeavors."

The right of publicity is described in Section 46 of the Restatement (Third) of Unfair Competition (2005), Appropriation of the Commercial Value of a Person's Identity: The Right of Publicity. This Restatement provision states that "[o]ne who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability. . . ." Relying on the Restatement, the Missouri Supreme Court held in *TCI,* 110 S.W.3d at 369, that "the elements of a right of publicity action include: (1) That defendant used plaintiff's name as a symbol of his identity (2) without consent (3) and with the intent to obtain a commercial advantage." *See also Gionfriddo,* 94 Cal.App.4th at 409, 114 Cal.Rptr.2d 307 ("The elements of [the tort of the right of publicity], at common law, are: '(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.'"). To prove a violation of one's right of publicity a plaintiff must establish that the defendant commercially exploited the plaintiff's identity without the plaintiff's consent to obtain a commercial advantage. *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831,

835 (6th Cir.1983). Thus, the court will proceed to determine whether the elements of the right of publicity are present in the matter under consideration.

1. Commercial Advantage Element of the Right of Publicity:

It is undisputed that CBC is using the players' names and playing records without the consent of the players. As such, the court must consider whether CBC's use of players' names in conjunction with their playing records in its fantasy baseball games utilizes the players' names as a symbol of their identities to obtain a commercial advantage and, if so, whether there is resulting injury.

In regard to the commercial advantage element of the right of publicity, "it is *irrelevant* whether [a] defendant *intended to injure* the plaintiff." *TCI,* 110 S.W.3d at 371 (citing McCarthy, Rights of Publicity, § 3.28) (emphasis added). The *intent* must be *to obtain a commercial advantage. Id. See also Carson,* 698 F.2d at 837 ("[U]nder the existing authorities, a celebrity's legal right of publicity is invaded whenever his identity is intentionally appropriated for commercial purposes."). Evidence which shows that a defendant *intended to create an impression* that a *plaintiff is associated* with the defendant's product "alone is sufficient to establish the commercial advantage element in a right of publicity action." *TCI,* 110 S.W.3d at 371 (citations omitted). Additionally, using a plaintiff's name "to attract attention to [a] product" is evidence supporting a conclusion that a defendant sought to obtain a commercial advantage. *Id.* at 372.[9] For example, in

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[9] Use of a plaintiff's name, however, must be more than "incidental" to violate the right of publicity. *TCI,* 110 S.W.3d at

Henley v. Dillard Department Stores, where it was uncontroverted that the defendant intended to use the plaintiff's name to make an advertisement "more interesting," the court found the requisite intent to use for commercial advantage. 46 F.Supp.2d 587, 592-93 (N.D.Tex.1999) ("[The defendant] intended for [potential customers] to associate the expression 'Don's henley' with the Plaintiff Don Henley. Furthermore, . . . the ad's designer, admitted that she believed the expression Don's henley would catch the

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375 (holding that when a plaintiff's name and identity are used without intent to obtain a commercial advantage but where they are used for some other purpose, the use is incidental and does not violate the right of publicity). The court in *Henley*, 46 F.Supp.2d at 594 n. 6, provided the following examples of incidental use:

> "Incidental use" was found where a motion picture showed a factory building upon which there was a sign bearing the name and business of the plaintiff. *Merle v. Sociological Research Film Corp.*, 166 A.D. 376, 152 N.Y.S. 829 (1 Dept.1915). The court held that no violation of the New York statute had taken place, since in order to constitute such a violation, it must appear that the use of plaintiff's picture or name is itself for the purpose of trade and is not merely an incidental part of a photograph of an actual building.
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> The court in *Moglen v. Varsity Pajamas, Inc.*, found an "incidental use" where a newspaper article reporting plaintiff's loss of a tennis match was partly reproduced, together with other articles, as a patchwork pattern in a fabric which defendants manufactured and sold for use in underwear, pajamas, and play togs. The court held that such use did not meet the requirement of a meaningful or purposeful use of a name, since the pattern of the newspaper page as a patch in the fabric was only incidental to the design of the fabric and the appearance of plaintiff's name in the article was an even more casual and incidental use. 13 A.D.2d 114, 213 N.Y.S.2d 999 (1 Dept.1961).

consumers' eye because of its similarity to the name 'Don Henley.'"). *See also Abdul-Jabbar v. Gen. Motors*, 85 F.3d 407, 415-16 (9th Cir.1996) (quoting *Eastwood v. Superior Court for Los Angeles County*, 149 Cal.App.3d 409, 198 Cal.Rptr. 342, 349 (1983)) (finding a violation of the right of publicity where the defendant used "the plaintiff's birth name [to] attract[ ] television viewers' attention.").

Unlike cases where the commercial advantage element of the right of publicity has been found, there is nothing about CBC's fantasy games which suggests that any Major League baseball player is associated with CBC's games or that any player endorses or sponsors the games in any way. The use of names and playing records of Major League baseball players in CBC's games, moreover, is not intended to attract customers away from any other fantasy game provider because all fantasy game providers necessarily use names and playing records. Indeed, there is no evidence to create a triable issue as to whether CBC intended to create an impression that Major League baseball players are associated with its fantasy baseball games or as to whether a reasonable person would be under the impression that the baseball players are associated with CBC's fantasy games any more than the players are associated with a newspaper boxscore. As such, there is no triable issue of fact as to whether CBC uses Major League baseball players' names in its fantasy baseball games with the intent of obtaining a commercial advantage.

In regard to the commercial advantage element of the right to publicity and relying on *Palmer v. Schonhorn Enterprises, Inc.*, 96 N.J.Super. 72, 232 A.2d 458 (1967), the Players' Association and Advanced Media seek to draw analogy of the matter

under consideration to use of a famous person's picture in a board game. As do the baseball players in the matter under consideration, the golfers in *Palmer* contended that "the use of their respective names reduce[d] their ability to obtain satisfactory commercial affiliation by licensing agreements." *Id.* at 459. Upon finding in favor of the golfers, however, the court in *Palmer relied upon the defendant's use of the golfers' pictures* and cited cases wherein recovery was permitted for an *invasion of privacy*[10] where a picture of a famous person was used. *Id.* at 461 ("Where defendant sold lockets with removable *photographs* of plaintiff in each one, it was held that plaintiff-actress could recover for this invasion of her privacy.") (emphasis added) (citing *Lane v. F.W. Woolworth Co.*, 171 Misc. 66, 11 N.Y.S.2d 199 (S.Ct.1939)); ("Where defendant inserted *pictures* of plaintiffs, widely known baseball players, in containers of popcorn and chewing gum, recovery was permitted.") (emphasis added) (citing *Jansen v. Hilo Packing Co.*, 202 Misc. 900, 118 N.Y.S.2d 162 (S.Ct.1952)); ("Where defendant inserted a *picture* of a motion picture actress using a certain camera, with an inscription beneath it giving her name, in a manual for the use of such camera, she was permitted a recovery.") (emphasis added) (citing *Selsman v. Universal Photo Books, Inc.*, 18 A.D.2d 151, 238 N.Y.S.2d 686 (App.Div.1963)).

To the extent that *Palmer* involved the unauthorized use of professional golfers' names and playing records in the defendant's board games, the court

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[10] The court in *Palmer*, 232 A.2d at 461, did not consider the right of publicity per se. Rather, the court in *Palmer*, 232 A.2d at 459, made it clear that the issue before it was whether the defendant was violating the plaintiff's right of privacy.

acknowledges that *Palmer* has certain factual similarities to the matter under consideration, but with the critical exception that the defendant in *Palmer* used golfers' *pictures*; there is no allegation in the matter under consideration that CBC uses baseball players' pictures in conjunction with its fantasy baseball games; rather, the contention is that CBC uses players names in conjunction with their playing records. Indeed, cases, including *Palmer*, which address unauthorized use of a famous person's picture are distinguishable from CBC's use of baseball players' names and playing records and, therefore, do not suggest that CBC is using players' names and/or playing records to obtain a commercial advantage. Unlike cases where there was an appropriation of a *likeness* to create the impression that a famous person endorsed a product, CBC's use of players' names in no way creates an impression that players endorse CBC's fantasy games. *See e.g., Abdul-Jabbar*, 85 F.3d 407 (holding that use of a basketball star's former name in conjunction with his *likeness* could be construed as his endorsement of a product); *Cardtoons, L.C. v. Major League Baseball Players' Ass'n*, 95 F.3d 959, 968 (10th Cir.1996) (holding that the defendant's use of players' *likenesses* in parody trading cards violated the right of publicity)[11]; *Toney v. L'Oreal USA*, 406 F.3d 905, 910 (7th Cir.2005) (holding that the defendant's use of a model's *likeness* in connection with the packaging and promotion of its hair care product violated the right of publicity); *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 692-93 (9th Cir.1998) (finding a "triable issue of fact" as to

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[11] Ultimately, as set forth below, the court in *Cardtoons*, 95 F.3d at 976, found that although the right of publicity was violated the First Amendment prevailed.

whether the plaintiff was "readily identifiable as the pitcher in [an] advertisement" and "whether the advertisement made use of [the plaintiff's] *likeness*").

Most significantly *Palmer* was decided in 1967 and is inconsistent with more recent case authority including the Supreme Court's decision in *Zacchini*.[12] *Palmer* does not accurately reflect the concept of the right of publicity as articulated by the courts of various jurisdictions including the Supreme Court and, therefore, is not controlling in this matter.[13] In this regard, the court in *Palmer*, 232 A.2d. at 460, acknowledged that, at the time of the decision,

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[12] The Players' Association and Advanced Media also rely upon *Uhlaender v. Henricksen*, 316 F.Supp. 1277 (D.Minn.1970), which case involved the defendant's use of baseball players' names, uniform numbers and statistical information in its board games. The baseball players in *Uhlaender*, as do baseball players in the matter under consideration, alleged that the defendant engaged in "'misappropriation and use for commercial profit of the names of professional major league baseball players without the payment of royalties.'" *Id.* at 1279 (quoting the Complaint). The court in *Uhlaender* found that the defendants engaged in the unauthorized appropriation of the players' "names and statistics for commercial use" and that, therefore, the baseball players were entitled to relief. *Id.* at 1283. Like *Palmer*, *Uhlaender* was decided early in the development of the recognition of the common law right of publicity and is inconsistent with more recent case authority including the Supreme Court's decision in *Zacchini*. As such, *Uhlaender* is not controlling.

[13] The court in *Palmer* failed to consider the element of the right of publicity which requires that a defendant use a plaintiff's identity or persona. More recent authority reflects that use of a person's identity or persona is a critical element in establishing a right to recovery under a right of publicity theory. *See e.g., Cardtoons*, 95 F.3d at 968; *Carson*, 698 F.2d at 835; *Henley*, 46 F.Supp.2d at 597; *TCI*, 110 S.W.3d at 369, 372; *Gionfriddo*, 94 Cal.App.4th at 409, 114 Cal.Rptr.2d 307.

recognition of the right of privacy itself was a relatively new concept.

The court finds, therefore, for the reasons fully set forth above that the undisputed facts establish that the commercial advantage element of the right of publicity is not met in the matter under consideration.

2. Identity Element of the Right of Publicity:

It remains to be determined in regard to the elements of the right of publicity whether CBC has, and is, using the players' names "as a symbol of their identity." One's persona is most significant in a right of publicity cause of action. *Carson*, 698 F.2d at 835 ("The right of publicity has developed to protect the commercial interest of celebrities in their *identities.*") (emphasis added); *Rosemont Enterprises, Inc. v. Urban Sys., Inc.*, 72 Misc.2d 788, 340 N.Y.S.2d 144, 146 (Sup.Ct.1973) ("There is no question but that a celebrity has a legitimate proprietary interest in his public *personality.*") (emphasis added); *Ali v. Playgirl, Inc.*, 447 F.Supp. 723, 728 (S.D.N.Y.1978) ("The distinctive aspect of the common law right of publicity is that it . . . protects [a prominent person's] proprietary interest in the profitability of his public reputation or '*persona.*'") (emphasis added).

To resolve the issue of whether a public personality's name is used as a *symbol of his or her identity*, it is appropriate to consider "'the nature and extent of the identifying characteristics used by the defendant, the defendant's intent, the fame of the plaintiff, evidence of actual identification made by third persons, and surveys or other evidence indicating the perceptions of the audience.'" *TCI*, 110 S.W.3d at 370 (quoting Restatement (Third) of Unfair

Competition, § 46 cmt. d.). For example, in *TCI*, upon determining whether the defendant used, in a comic book, plaintiff Tony Twist's name as a symbol of his identity, the court in *TCI* considered the real Tony Twist's fame as a star in the National Hockey League, the nature and extent of the identifying characteristics used by the defendant, and their similarity to those characteristics in the public persona of the real Tony Twist including the "common persona of a tough-guy 'enforcer.'"[14] *Id.* The court also considered that it was the intent of the defendant to draw attention to those similarities.[15] As such, the court in *TCI* concluded that "the evidence supported a finding that [the defendants] used Twist's *name **and** identity* 'with the intent to obtain a commercial advantage.'" *Id.* at 375 (emphasis added).[16] Thus, upon determining whether

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[14] The court in *TCI*, 110 S.W.3d at 366, noted that the defendant's comic book character was "villainous" and that the real life Tony Twist "had a reputation as a tough-guy 'enforcer' and perhaps because of that reputation, Twist was immensely popular with the hometown fans. He endorsed products, appeared on the radio and television, hosted the 'Tony Twist' television talk show for two years, and became actively involved with several children's charities."

[15] The Missouri Supreme Court considered in *TCI*, 110 S.W.3d at 375, that a verdict director erroneously "omitted any requirement that the jury find that defendant used plaintiff's identity rather than merely his name." However, because the evidence "so clearly established that [ ] Tony Twist was the basis for the [comic book] character's name," the court found that this omission did not prejudice the defendants. *Id.* This finding in *TCI* further emphasizes that according to the Missouri Supreme Court mere use of a name is not enough to establish a violation of the right of publicity; identity is a critical element of the right of publicity.

[16] The court in *TCI*, 110 S.W.3d at 375, set aside the jury's verdict in favor of the plaintiff, the real Tony Twist, however,

there is a violation of the right of publicity in the matter under consideration, how players' names are used is significant rather than the mere fact that they are used. *Id.* at 369.

Indeed, not all uses of another's name are tortious; mere use of a name as a name is not tortious. *Id.* Rather, a name must be used as a *symbol of* the plaintiff's *identity* in a right of publicity action. *Id. See also Carson*, 698 F.2d at 835[17] ("If the celebrity's *identity* is commercially exploited, there has been an invasion of his right whether or not his 'name or likeness' is used. Carson's identity may be exploited even if his name, John W. Carson, or his picture is not used."). As such, CBC's mere use of Major League baseball players' names in conjunction with their playing records does not establish a violation of the players' right of publicity. CBC's use of the baseball players' names and playing records in the

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because the verdict director improperly instructed the jury in regard to the commercial advantage element of the right of publicity. The verdict director did not require the jury to find that the defendants used the "plaintiff's name 'with the intent to derive' or 'for the purpose of deriving' a[ ] [commercial] advantage." *Id.* Thus, the jury could have found the defendant liable "based on the mere incidental result of the use rather than the intentional result" to derive a commercial advantage. *Id.*

[17] In *Carson*, 698 F.2d 831, it was alleged that the defendant violated the right of privacy by using the phrase "Here's Johnny" as a corporate name and in conjunction with the sale and rental of portable toilets. The defendant also used the phrase "The World's Foremost Commodian" in the marketing of its product. The name and picture of Johnny Carson, a comedian and the host of a nightly television show, who used "Here's Johnny" as an introductory slogan on his nightly television show, had been licensed to an apparel company and to men's toiletries company. Johnny Carson and the apparel company brought suit against the defendant.

circumstances of this case, moreover, does not involve the character, personality, reputation, or physical appearance of the players; it simply involves historical facts about the baseball players such as their batting averages, home runs, doubles, triples, etc. CBC's use of players' names in conjunction with their playing records, therefore, does not involve the persona or identity of any player. *See id.; TCI*, 110 S.W.3d at 369-70. Indeed, under the facts of this case there is no triable issue as to whether the persona or identity element of the right of publicity is present.

For the reasons fully set forth above, the court concludes that the undisputed facts establish that CBC does not use in its fantasy baseball games Major League baseball players' names separately or in conjunction with their playing records as a symbol of their identity; that CBC does not use players' names separately or in conjunction with their playing records with the intent to obtain a commercial advantage; and that, therefore, the elements of the right of publicity are not present in the matter under consideration. *See Zacchini*, 433 U.S. at 573, 97 S.Ct. 2849; *TCI*, 110 S.W.3d at 368-69; *Gionfriddo*, 94 Cal.App.4th at 413, 114 Cal.Rptr.2d 307.[18]

3. Policy Considerations Applicable to the Right of Publicity:

Next the court will address policy considerations behind the right of publicity to determine whether

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[18] To the extent that resulting injury is an element of the right of publicity the court need not address this element as it has found that the other elements are not present. *See Gionfriddo v. Major League Baseball*, 94 Cal.App.4th 400, 409, 114 Cal.Rptr.2d 307 (Cal.Ct.App.2001). However, in addressing the policy reasons behind the right of publicity the court finds below that players have not been damaged.

CBC's use of players' names in conjunction with their playing records in its fantasy baseball games contravenes these policies. The Restatement (Third) of Unfair Competition § 46, Cmt. c (2005), states that the justification for the right of publicity includes: (1) protection of "an individual's interest in personal dignity and autonomy"; (2) "secur[ing] for plaintiffs the commercial value of their fame"; (3) "prevent[ing] the unjust enrichment of others seeking to appropriate" the commercial value of plaintiffs' fame for themselves; (4) "preventing harmful or excessive commercial use that may dilute the value of [a person's] identity"; and (5) "afford[ing] protection against false suggestions or endorsement or sponsorship." "The right to publicity protects the ability of public personae to control the types of publicity that they receive. The right to publicity protects pecuniary, not emotional, interests."[19] *Ventura v. Titan Sports, Inc.*, 65 F.3d 725, 730 (8th Cir.1995) (citing *Uhlaender v. Henricksen*, 316 F.Supp. 1277, 1280-81 (D.Minn.1970)). *See also* J. Thomas McCarthy, The Rights of Publicity and Privacy § 1:4 at 3 (2d ed. 2005) ("[T]he right of publicity is the inherent right of every human being to control the commercial use of his or her identity."). The right of publicity "protect[s] a person from losing the benefit of their [sic] work in creating a publicly recognizable persona.'" *TCI*, 110 S.W.3d at 368 (quoting *Bear Foot, Inc. v.*

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[19] *See e.g., Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 824 (9th Cir.1974) (applying the right of publicity to a professional race car driver); *Ali v. Playgirl, Inc.*, 447 F.Supp. 723 (S.D.N.Y.1978) (applying the right of publicity to a professional boxer); *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 413 (9th Cir.) (applying the right of publicity to a professional basketball player); *Grant v. Esquire, Inc.*, 367 F.Supp. 876 (S.D.N.Y.1973) (applying the right of publicity to an actor).

Chandler, 965 S.W.2d 386, 389 (Mo.Ct.App.1998)). "'[T]he right of publicity protects against commercial loss caused by appropriation of an individual's [identity] for commercial exploitation.'" *Id.* (quoting 4 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 28.6 (4th ed.2003)). This right protects a public figure's right to receive pecuniary gain for the commercial use of his or her likeness. *Haelan Labs.*, 202 F.2d at 868 ("[I]t is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, buses, trains and subways.").

Upon finding in favor of the performer/plaintiff the Supreme Court concluded in *Zacchini*, in regard to the purpose of the right of publicity, that:

> "The rationale for (protecting the right of publicity) is the straightforward one of *preventing unjust enrichment* by the theft of good will. No social purpose is served by having the defendant get free some aspect of [the performer] that would have market value and *for which he would normally pay.*" (citation omitted). Moreover, the broadcast of [the performer's] entire performance, unlike the unauthorized use of another's name for purposes of trade or the incidental use of a name or picture by the press, *goes to the heart of [the performer's] ability to earn a living as an entertainer.*

433 U.S. at 576, 97 S.Ct. 2849 (emphasis added). *See also Carson*, 698 F.2d at 837 ("Vindication of the right [of publicity] will also tend to prevent unjust

enrichment by persons . . . who seek commercially to exploit the identity of celebrities without their consent.").

All of the above the policy considerations are aimed at preventing harmful or excessive commercial use of one's celebrity in a manner which could dilute the value of a person's identity. *See Zacchini,* 433 U.S. at 576, 97 S.Ct. 2849; *Ventura*, 65 F.3d at 730; *Carson*, 698 F.2d at 837; *TCI*, 110 S.W.3d at 368. However, CBC's use of Major League baseball players' names and playing records in fantasy baseball games does not go to the heart of the players' ability to earn a living as baseball players; the baseball players earn a living playing baseball and endorsing products; they do not earn a living by the publication of their playing records.[20] *See Zacchini*, 433 U.S. at 576, 97 S.Ct. 2849. Moreover, CBC's use of Major League baseball players' names and playing records does not give CBC something free for which it would otherwise be required to pay; players' records are readily available in the public domain. *See id.*

In fact, case law suggests that CBC's use of the names and playing records of Major League baseball players in the circumstances of this case actually enhances the marketability of the players. The plaintiffs in *Gionfriddo*, 94 Cal.App.4th at 413, 114 Cal.Rptr.2d 307, who were baseball players them-

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[20] While not relying on these reports, the court notes that expert reports in the matter under consideration suggest that, in fact, fantasy sports games increase the commercial value of players' identities because the games encourage participants to attend live games, pay for television packages, or watch on television sporting events in which they otherwise would not be interested. *See e.g.*, Saunders Expert Report ¶¶ 11-20; Thomas Decl. ¶¶ 10.

selves, argued that the baseball clubs used players' "information . . . to *increase interest in baseball,* with the belief that this would increase attendance at games." (emphasis added). Additionally, the court concluded in *Gionfriddo* that "the challenged uses [which] involve[d] statements of historical fact, descriptions of these facts or video depictions of them," would "likely" "enhance[ ]" the players' marketability. *Id.* at 415, 114 Cal.Rptr.2d 307. As such, it cannot be said that CBC's use of the Major League baseball players' names and playing records in the circumstances of this case deprives the players of their proprietary interest in reaping the reward of their endeavors. *See Zacchini*, 433 U.S. at 573, 575-76, 97 S.Ct. 2849. The court finds, therefore, for the reasons fully set forth above that the undisputed facts establish that CBC's use of players' names and/or playing records in its fantasy baseball games does not contravene the policies behind the right of publicity.

In summary, the court finds that the undisputed facts establish that CBC does not use in its fantasy baseball games Major League baseball players' names separately or in conjunction with their playing records as a symbol of their identity; that CBC does not use players' names separately or in conjunction with their playing records with the intent to obtain a commercial advantage; that CBC's use of players' names separately or in conjunction with their playing records does not contravene the policy behind the right of publicity; and that, therefore, CBC has not and is not violating the players' claimed right of publicity. *See id.* at 573, 97 S.Ct. 2849; *TCI*, 110 S.W.3d at 368-69; *Gionfriddo*, 94 Cal.App.4th at 409, 114 Cal.Rptr.2d 307.

However, in order to address all the issues raised by the parties, the court will assume, arguendo, that the right of publicity of the Major League baseball players is violated under the circumstances of the matter under consideration. The court will, therefore, consider whether the First Amendment prevails over the players' claimed right of publicity and whether copyright law preempts this right.

B. The First Amendment:

CBC argues, in the event it has violated the players' right of publicity, that speech is involved in its fantasy games; that this speech does not differ from raw statistics published in newspapers; that the speech involved in its fantasy games is expression which is protected under the First Amendment; and that the First Amendment trumps the right of publicity in the circumstances of this case. The Players' Association and Advanced Media argue that CBC's games do not involve speech or the expression of ideas; that what is at issue in this matter is not speech; and that, therefore, the First Amendment does not apply.[21]

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[21] In *New York Times Co. v. Sullivan*, 376 U.S. 254, 265, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), the Supreme Court articulated the requirement that for the First Amendment to apply there must be state action. (holding that while "[t]he Fourteenth Amendment is directed against State action and not private action," the state action requirement is met in a civil action where state law is applied, whether by statute or common law). *See also Cardtoons*, 95 F.3d at 968 (holding that the state action requirement for the applicability of the First Amendment is met where it is alleged that a state statute allegedly restricts the right of free expression). The parties do not refute the presence of the requisite state action. In any case, the state action requirement is met in the matter under consideration because the parties seek to apply a state rule of law, the right of

1. Applicability of the First Amendment to the Right of Publicity:

The court will first consider whether the First Amendment right of expression is applicable to CBC's fantasy baseball games. In *Zacchini*, 433 U.S. at 567, 97 S.Ct. 2849, the Supreme Court recognized that First Amendment principles can be applicable where the right of publicity is claimed. As such, it must be determined whether the First Amendment is applicable in the circumstances of the matter before this court.

a. *Application of the First Amendment to Less Traditional Forms of Expression:*

Speech which does not use "a traditional medium of expression" does not receive less protection that more traditional means of speech. *Cardtoons*, 95 F.3d at 969. As such, the First Amendment has been applied to flag burning, nude dancing, and wearing a jacket with obscenities. *Id.* (citations omitted). Moreover, the fact that expression appears in a novel medium does not preclude its being subject to First Amendment protection. *Interactive Digital Software Association v. St. Louis County*, 329 F.3d 954, 957 (8th Cir.2003). Thus, to the extent that it can be said that CBC's use of the names and playing records of Major League baseball players on a website is not traditional, this non-traditional expression is not precluded from First Amendment protection.

b. *Application of the First Amendment to Factual Data and History:*

Courts have found that First Amendment freedom of expression is applicable in cases where the subject

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publicity, which rule of law is alleged to restrict freedom of expression. *New York Times*, 376 U.S. at 265, 84 S.Ct. 710.

matter at issue involved *factual data and historical facts.* For example, in *Gionfriddo*, 94 Cal.App.4th at 410, 114 Cal.Rptr.2d 307, the court concluded that the "precise information conveyed . . . consist[ed] of factual data concerning [baseball] players [and] their performance statistics" and that, as such the First Amendment was applicable.[22] The California court in *Gionfriddo* characterized the information conveyed by the defendant as "mere bits of baseball's history." *Id.* Significantly, the California court further held that the First Amendment protects "recitations of [baseball] players' accomplishments. 'The freedom of the press is constitutionally guaranteed, and the publication of daily news is an acceptable and necessary function in the life of the community.' (citations omitted). 'Certainly, the accomplishments . . . of those who have achieved a marked reputation or notoriety by appearing before the public such as . . . *professional athletes* . . . may legitimately be mentioned and discussed in print or on radio and television.'" *Id.* (citation omitted) (emphasis in original). *See also Cardtoons*, 95 F.3d at 968 (holding that because the defendant's parody baseball cards disseminated information the trading cards were entitled to full First Amendment protection).

Indeed, the manner in which CBC uses the names and playing records of Major League Baseball players in the context of its fantasy baseball games repre-

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[22] In *Gionfriddo*, 94 Cal.App.4th at 405, 410, 114 Cal.Rptr.2d 307, retired baseball players challenged the use of their performance statistics, photographs, and verbal and video descriptions of their play in violation of their statutory and common law right of publicity by the defendants who included the Major League Baseball Clubs and their agent for purposes of use of the Club's trademarks.

sents the accomplishments of Major League baseball players. The names and playing records of the baseball players as used by CBC are, in fact, "bits of baseball history" which educate the public about baseball. Most importantly, the statistical information about Major League baseball players, including their hits, runs, doubles, etc., which CBC disseminates, represents historical facts about baseball players. *See* CBC's Ex. 16E, attached hereto; *Cardtoons*, 95 F.3d at 969, *Gionfriddo*, 94 Cal.App.4th at 410, 114 Cal.Rptr.2d 307.

c. *Application of the First Amendment in the Context of Profit:*

A defendant's *making a profit* does not preclude its receiving First Amendment protection. *Time Inc. v. Hill*, 385 U.S. 374, 396-97, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967) ("'That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment.'") (citations omitted). *See also ETW*, 332 F.3d at 924 ("Speech is protected even though it is carried in a form that is sold for profit.") (citations omitted) and ("The fact that expressive materials are sold does not diminish the degree of protection to which they are entitled under the First Amendment") (citing *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n. 5, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988)). The court finds, therefore, that CBC's deriving a profit from its use of the names and playing records of Major League baseball players in its fantasy baseball games does not preclude such use from having First Amendment protection.

d. *Application of the First Amendment in the Context of Expression that Entertains:*

The First Amendment has been applied in the context of the right of publicity where the expression at issue *entertains*. *Cardtoons*, 95 F.3d at 969; *Gionfriddo*, 94 Cal.App.4th at 410, 114 Cal.Rptr.2d 307. This rationale is applied because "the public interest is not limited to current events; the public is also entitled to be informed and *entertained about [ ] history.*" *Id.* (citation omitted) (emphasis added). Indeed, "entertainment itself can be important news"; "[e]ntertainment features receive the same constitutional protection as factual news reports." *Id.* (citing *Zacchini*, 433 U.S. at 578, 97 S.Ct. 2849) (other citations omitted). The fact that the social commentary is humorous, rather than serious, does not preclude First Amendment protection. *Cardtoons*, 95 F.3d at 969 ("Speech that entertains, like speech that informs, is protected under the First Amendment because '[t]he line between the informing and the entertaining is too elusive for the protection of that basic right.'") (quoting *Winters v. New York*, 333 U.S. 507, 510, 68 S.Ct. 665, 92 L.Ed. 840 (1948)) and (citing *Zacchini*, 433 U.S. at 578, 97 S.Ct. 2849). Additionally, "'[n]o suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the . . . importance of the ideas seeking expression.'" *Time*, 385 U.S. at 388, 87 S.Ct. 534 (quoting *Bridges v. California*, 314 U.S. 252, 269, 62 S.Ct. 190, 86 L.Ed. 192 (1941)). Clearly, CBC's use of the names and playing records of Major League baseball players is meant to entertain game participants and persons using CBC's website. The court finds that this characterization, however, does not preclude CBC's use of players' names and playing records from

receiving First Amendment protection. *See Cardtoons*, 95 F.3d at 968; *Gionfriddo*, 94 Cal.App.4th at 410, 114 Cal.Rptr.2d 307.

e. *Application of the First Amendment in the Context of Interactive Expression:*

Expression is not disqualified from First Amendment protection because it is *interactive*. *Interactive Digital Software*, 329 F.3d at 957. Thus, "the breadth of the First Amendment" has been extended to "pictures, graphic design, concept art, sounds, music, stories, and narrative present in video games." *Id.* The First Amendment is applicable to interactive expression because "literature is most successful when it 'draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own.'" *Id.* (quoting *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 577 (7th Cir.2001)). As such, to the extent that CBC's use of the names and playing records of Major League baseball players in the circumstances of this case involves interaction among game participants and between game participants and CBC's website, such interaction does not preclude such use from being protected under the First Amendment.

f. *Application of the First Amendment to Commercial Speech:*

The Players' Association suggests, to the extent expression is involved in the matter under consideration, that such expression is actually commercial speech and that it is, therefore, not protected under the First Amendment. Doc. 111 at 20.

"Commercial speech is best understood as speech that merely advertises a product or service for

business purposes." *Cardtoons*, 95 F.3d at 970 (citation omitted). "The Supreme Court has defined commercial speech as 'expression related solely to the economic interests of the speaker and its audience.'" *Id.* (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980)). Expression, however, is not commercial speech if it does not advertise another unrelated product, and speech is not transformed into commercial speech merely because the product at issue is sold for profit. *Id.* (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976)).[23]

In the context of the matter under consideration, CBC communicates information about Major League baseball players; CBC does not use players' names

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[23] Indeed, speech which is commercial in nature *may* under certain circumstances be protected under the First Amendment. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 500, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996). The Supreme Court has held that it "is error to assume that commercial speech [is] entitled to no First Amendment protection or that it [is] without value in the marketplace of ideas." *Id.* at 496, 116 S.Ct. 1495. However, "*the use of a persons's identity* for purely commercial purposes, like *advertising* goods or services or the use of a person's name or likeness on merchandise, is rarely protected." *TCI*, 110 S.W.3d at 373 (emphasis added) (citing *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1002 (9th Cir.2001); *White v. Samsung Elec. Am., Inc.*, 971 F.2d 1395, 1397-99 (9th Cir.1992); *Midler v. Ford Motor Co.*, 849 F.2d 460, 462-64 (9th Cir.1988)). Because the court finds above that the expression involved in CBC's fantasy games is not commercial speech, the court need not consider whether or not it is protected commercial speech. It is significant, nonetheless, that the court has also found that CBC's fantasy games do not use players' identities. *See id.*

and playing records for the purpose of advertising a product or services. As such, the court finds that CBC's use of the players' names and playing records is not commercial speech. *Id.* at 970.

In summary and for the reasons fully set forth above, the court finds that the players' records which CBC provides are available to the public at large by watching games and are disseminated to the public in newspapers and by statistics providers; CBC uses players' names to convey information, the players' records, which information is already in the public domain. *See* Ex. 16 E; *Interactive Digital Software*, 329 F.3d at 954. CBC's website encourages game participants to learn about players' playing records and can be said to provide an education in baseball. *See Cardtoons*, 95 F.3d at 968-69. Further, CBC's games disseminate statistical information about baseball players; this statistical information is historical fact. *See id.* at 969; *Gionfriddo*, 94 Cal.App.4th at 410, 114 Cal.Rptr.2d 307. Indeed, CBC's fantasy baseball games entertain participants based upon baseball history. *See id.* The fact that CBC derives a profit from its games does not preclude use of the players' names and playing records from being protected speech under the First Amendment. *See ETW*, 332 F.3d at 924; *Cardtoons*, 95 F.3d at 970. Likewise, to the extent that CBC's fantasy baseball games are interactive, use of players' names and playing records in the context of the games is not precluded from First Amendment protection. *See Interactive Digital Software*, 329 F.3d at 957. CBC's use of players' names and playing records in the context of this case is not commercial speech. *See Cardtoons*, 95 F.3d at 970.

For these reasons the court finds that the First Amendment is applicable in the context of the right

of publicity claim in the matter under consideration. *See Zacchini*, 433 U.S. at 567, 97 S.Ct. 2849; *New York Times Co.*, 376 U.S. at 265, 84 S.Ct. 710. The court further finds that CBC's use of the names and playing records of Major League baseball players in the context of the matter under consideration is speech which is protected under the First Amendment. *See Interactive Digital Software*, 329 F.3d at 957; *Cardtoons*, 95 F.3d at 968-69.; *ETW*, 332 F.3d at 924; *Gionfriddo*, 94 Cal.App.4th at 410, 114 Cal.Rptr.2d 307.

2. Balancing CBC's First Amendment Right of Freedom of Expression with the Players' Right of Publicity:

Once it is determined that the First Amendment is applicable in the context of a claim of the right of publicity, courts balance "the right to be protected from unauthorized publicity . . . against the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guaranties of freedom of speech and of the press.'" *Gionfriddo*, 94 Cal.App.4th at 409, 114 Cal.Rptr.2d 307 (citations omitted). *See also ETW*, 332 F.3d at 931; *TCI*, 110 S.W.3d at 372. "There is an inherent tension between the right of publicity and the right of freedom of expression under the First Amendment. This tension becomes particularly acute when the person seeking to enforce the right is a famous . . . athlete . . . whose exploits, activities, accomplishments, and personal life are subject to constant scrutiny and comment in the public media."

ETW, 332 F.3d at 931.[24] The Restatement (Third) of Unfair Competition, § 47, Comment c, notes that "'[t]he right of publicity as recognized by statute and common law is fundamentally constrained by the public and constitutional interest in freedom of expression.'" *Id.* at 930. As a result of the tension between the right of publicity and the First Amendment courts engage in "judicial line drawing." *Id.* at 931 ("'[A]t what point does the right [of publicity] collide with the right of free expression guaranteed by the First Amendment?'").[25]

Upon considering whether the First Amendment takes precedence over a claimed right of publicity, courts "balance the magnitude" of restricting the expression at issue "against the asserted governmental interest in protecting" the right of publicity. *Cardtoons*, 95 F.3d at 972. As such this court must examine the importance of CBC's right to freedom of expression and the consequences of limiting that right. *Id.* These consequences must be weighed against the effect of infringing on the Major League

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[24] In *ETW*, 332 F.3d at 918, professional golfer Tiger Woods sued a sports artist who created a painting entitled "'*The Masters of Augusta*' which commemorates Woods's victory at the Masters Tournament in Augusta, Georgia, in 1997."

[25] As noted by the court in *ETW*, 332 F.3d at 932, in *White v. Samsung Electronics America, Inc.*, 989 F.2d 1512, 1513, 1516 (9th Cir.1993), the dissenting opinion "observed, '[s]omething very dangerous is going on here. . . . Overprotecting intellectual property is as harmful as underprotecting it. Creativity is impossible without a rich public domain. . . . Intellectual property rights aren't free: They're imposed at the expense of future creators and of the public at large. . . . This is why intellectual property law is full of careful balances between what's set aside for the owner and what's left in the public domain for the rest of us.'"

baseball players' claimed right of publicity. *Id.* *See also Gionfriddo*, 94 Cal.App.4th at 410, 114 Cal.Rptr.2d 307 (holding that the public interest in expression must be weighed against the plaintiff's economic and noneconomic interests); *TCI*, 110 S.W.3d at 372 (holding that it is appropriate to "weigh the state's interest in protecting a plaintiff's property right to the commercial value of his or her name and identity against the defendant's right to free speech") (citing *Zacchini*, 433 U.S. at 574-75, 97 S.Ct. 2849).[26]

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[26] In *TCI*, 110 S.W.3d at 374, the Missouri Supreme Court concluded that the First Amendment's right of free speech gave way to the right of publicity in the circumstances of that case because the defendants used Tony Twist's *name **and** identity for a commercial advantage*, because the defendants agreed that the use of Twist's *name **and** identity* "was not a parody or other expressive comment or a fictionalized account of the real Twist," because "the metaphorical reference to Twist . . . ha[d] very little literary value compared to its commercial value," and because the use of the real Tony Twist's name and identity was *"predominantly a ploy to sell comic books* and related products rather than an artistic or literary expression." *Id.* at 374 (emphasis added). Because in the matter under consideration there is no exploitation of the identities of Major League baseball players, because the commercial value of players' identities is not at risk, and because there is no attempt by CBC to derive a commercial advantage over competitors in the fantasy game business by using the names and playing records of baseball players, these considerations of the Missouri court in *TCI* are not applicable.

Additionally, upon balancing the First Amendment and the right of publicity the Missouri Supreme Court in *TCI* applied a test which differed somewhat from that applied in *Cardtoons* and *Gionfriddo*. To the extent that the Missouri Supreme Court did not follow the analytic scheme of *Cardtoons*, this court is bound by federal authority in regard to constitutional issues and, therefore, must follow the analytic scheme applied by

In order to apply a First Amendment balancing test this court must first identify the rights involved. *Gionfriddo*, 94 Cal.App.4th at 410, 114 Cal.Rptr.2d 307. Upon identifying the interests at stake in *Zacchini* the Supreme Court considered that a goal of the right of publicity is to "focus[ ] on the right of the individual to reap the reward of his endeavors" and that this goal has "little to do with protecting feelings or reputation." 433 U.S. at 573, 97 S.Ct. 2849. The Court further noted that, where a right to publicity is claimed, the individual's interest at issue is the right to receive the commercial benefit of the publication of allegedly damaging matter. *Id.* at 574, 97 S.Ct. 2849. Upon concluding that the First Amendment did not take precedence over the right of publicity in the circumstances of *Zacchini*, the Court distinguished cases where a person's name is used "for purposes of trade or the incidental use of a name or picture by the press" from those which "*go[ ] to the heart of [a person's] ability to earn a living*" and which involve "*the very activity by which the entertainer acquired his reputation in the first place.*" *Id.* at 576, 97 S.Ct. 2849 (emphasis added). Clearly baseball players make a living playing baseball and may capitalize on their fame by endorsing products. In the matter under consideration, however, CBC's use of the names and playing records of Major League baseball players does not interfere with the players' ability to reap financial reward from these endeavors. As stated above, CBC's use of Major League baseball players' names and playing records in the circum-

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federal courts. *See, e.g., de Llano v. Berglund*, 282 F.3d 1031, 1035 (8th Cir.2002) ("[F]ederal law, not state law, . . . determines what constitutes adequate procedural due process").

stances of this case, therefore, does not go to the heart of the players' ability to earn a living.

Additionally, economic incentive is also justification for the right of publicity, particularly "in the field[ ] of sports."[27] *Cardtoons*, 95 F.3d at 973. In regard to the economic incentive element at stake in the right of publicity, the court in *Cardtoons* made the following observation which is applicable in the circumstances of the matter under consideration:

> [T]he additional *inducement for achievement* produced by publicity rights are often inconsequential because most celebrities with valuable commercial identities are already handsomely compensated. . . . [F]or example, . . . major league baseball players' salaries currently average over one million dollars per year, *see* Bill Brashler, *Booooooooooooooo! Let's Hear It for Pampered, Preening, Overpaid Whiners: The Jocks,* Chi. Trib., July 28, 1996, (Magazine), at 12. Such figures suggest that "even without the right of publicity the rate of return to stardom in the entertainment and sports fields is probably high enough to bring forth a more than 'adequate' supply of creative effort and achievement." *Madow,* supra; at 210. In addition, even in the absence of publicity rights, celebrities would still be able to reap financial reward from authorized

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[27] Noting that there are noneconomic justifications for the right of publicity, the court in *Cardtoons*, 95 F.3d at 975, did state that, "[p]rofessional athletes may be more responsible for their celebrity status [than other celebrities], however, because athletic success is fairly straightforwardly the result of an athlete's natural talent and dedication. Thus, baseball players may deserve to profit from the commercial value of their identities more than movie stars."

> appearances and endorsements. The extra income generated by licensing one's identity does not provide a necessary inducement to enter and achieve in the realm of sports and entertainment. Thus, while publicity rights may provide some incentive for creativity and achievement, the magnitude and importance of that incentive has been exaggerated.

Id. at 974.

Upon examining the interests involved in the right of publicity, right of publicity cases involving the value of one's performance, such as *Zacchini*, must be distinguished from right of publicity cases involving the economic value of one's identity. *Cardtoons*, 95 F.3d at 973. The "incentive rationale is obviously more compelling in a right of performance case than in a more typical right of publicity case involving the appropriation of a celebrity's identity." *Id.* As the matter under consideration does not involve actual performances of the Major League baseball players but rather involves an allegation that CBC uses the players' identities, the incentive rationale is not compelling in the circumstances of the matter before this court. *See id.*

Another economic justification for the right of publicity is that it "promotes the efficient allocation of resources." *Id.* "The efficiency argument is most persuasive in the context of advertising, where repeated use of a celebrity's likeness to sell products may eventually diminish its commercial value. The argument is *not as persuasive,* however, when applied to *nonadvertising uses.*" *Id.* at 975 (emphasis added). Significantly, the matter under consideration does not involve advertising.

Another "argument offered for rights of publicity is that they protect against consumer deception." *Id.* "The Lanham Act, [however,] already provides nationwide protection against false or misleading representations in connection with the sale of products." *Id.* (citations omitted). Thus, upon identifying the interests involved in the right of publicity a consideration is whether or not an alleged violation of this right is "likely to confuse or deceive customers." *Id.* In the circumstances of the matter before this court, CBC's use of the names and playing records of Major League baseball players does not suggest that the baseball players are making representations in regard to the sale of any product. As such, there is no likelihood of confusion or deception in the context of the matter before this court. *Id.*

It has been said that the right of publicity seeks to allow persons to enjoy the fruits of the goodwill which they have created. *Id.* at 975. Indeed, professional athletes have responsibility for their celebrity status based on their athletic achievements; their fame, however, is nonetheless "largely [a] creation of the media or the audience." *Id.* As such, balancing the scale in favor of the First Amendment in the circumstances of the matter before this court will not interfere with the ability of Major League baseball players to enjoy the fruits of their goodwill.

Another justification for the right of publicity includes the prevention of unjust enrichment. *Id.* at 976. In the circumstances of the matter under consideration, as CBC merely uses players' names and playing records which are already in the public domain, there is no possibility of unjust enrichment.

In regard to the rights of the public which countervail the interests involved in the right of

publicity, the public has an "interest in the dissemination of news and information consistent with the democratic processes under the constitutional guaranties of freedom of speech and of the press." *Gionfriddo* 94 Cal.App.4th at 406, 114 Cal.Rptr.2d 307.[28] Significant to the matter under consideration, the court in *Gionfriddo* held that "[t]he recitation and discussion of *factual data concerning the athletic performance* of these plaintiffs [who were retired professional baseball players] command a substantial public interest." *Id.* *See also Cardtoons*, 95 F.3d at 973 (holding that the public has an interest in having access to factual data from baseball games). This court has found, in the circumstances of this case, that CBC's use of the names and playing records of Major League baseball players in its fantasy baseball games informs and entertains about the history of baseball. The public's interest in this suggests that

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[28] The court in *Gionfriddo* held:

> [B]aseball fans have an abiding interest in the history of the game. The public has an enduring fascination in the records set by former players and in memorable moments from previous games. Statistics are kept on every aspect of the game imaginable. Those statistics and the records set throughout baseball's history are the standards by which the public measures the performance of today's players. The records and statistics remain of interest to the public because they provide context that allows fans to better appreciate (or deprecate) today's performances. Thus, the history of professional baseball is integral to the full understanding and enjoyment of the current game and its players.
>
> In the uses challenged, Baseball is simply making historical facts available to the public through game programs, Web sites and video clips.

94 Cal.App.4th at 411, 114 Cal.Rptr.2d 307 (citations omitted).

the interests should be balanced in favor of the First Amendment rather than in favor of the right of publicity.

Also, it is significant in the matter before this court that if the players' right of publicity were to prevail over CBC's First Amendment right of freedom of expression, CBC's First Amendment right of freedom of expression would be totally extinguished; CBC would be unable to create and operate its fantasy games as the games cannot operate without the players' **names** *and* **playing records**. To the extent that Advanced Media and the Players' Association contend that they do not object to the use of players' playing records but rather only to their names, such use by CBC is not realistic; the records mean nothing without the names. For example, it would be meaningless and useless to its game participants for CBC to report that there were five home runs or ten singles in a baseball game without identifying the players who hit the home runs or singles. As such, CBC would be out of business if it were precluded from using in its fantasy games either players' names or their names in conjunction with their playing records. *See e.g., ETW Corp.*, 332 F.3d at 938 ("Permitting [Tiger] Woods's right of publicity to trump [the defendant's] right of freedom of expression would extinguish [the defendant's] right to profit from his creative enterprise").

For the reasons more fully set forth above, after balancing the interests at issue regarding CBC's First Amendment right to freedom of expression and those involved in the players' claimed right of publicity the court finds, in the circumstances of this case, that CBC's First Amendment right to freedom of expression prevails over the players' claimed right

of publicity; none of the justifications for the right of publicity compel a finding that the First Amendment should not trump the right of publicity. *See Cardtoons*, 95 F.3d at 972-76; *Gionfriddo*, 94 Cal.App.4th at 410, 114 Cal.Rptr.2d 307. The policy considerations and interests at risk upon restricting CBC's First Amendment right to freedom of expression outweigh the policy considerations and interests at risk in the players' claimed right of publicity. *See Cardtoons*, 95 F.3d at 972-76; *Gionfriddo*, 94 Cal.App.4th at 410, 114 Cal.Rptr.2d 307.

In summation, the court finds that the First Amendment applies in the matter under consideration. *See Zacchini*, 433 U.S. at 567, 97 S.Ct. 2849; *New York Times*, 376 U.S. at 265, 84 S.Ct. 710; *ETW*, 332 F.3d at 930. Moreover, assuming, arguendo, that the players have a right of publicity in their names and playing records and that CBC has and is violating the players' right of publicity, the court finds, in the circumstances of this case, that the players' right of publicity must give way to CBC's First Amendment right to freedom of expression.

C. Federal Copyright Law:

The court has found above that CBC has not and is not violating the players' claimed right of publicity. CBC and the Fantasy Sports Trade Association contend that, even if the players' have a right of publicity and this right was violated, federal copyright law preempts this right. Doc. 76 at 9; Doc. 105 at 21; Doc. 107; Doc. 124 at 6-7.

1. Copyright Preemption:

The Copyright Act includes an express preemption provision which provides that "all legal or equitable rights that are equivalent to any of the exclusive

rights within the general scope of copyright . . . are governed exclusively by [the Copyright Act]." 17 U.S.C. § 301(a). In *National Car Rental System, Inc. v. Computer Associates International, Inc.*, 991 F.2d 426, 428-29 (8th Cir.1993), the Eighth Circuit held that a state cause of action is preempted by the Copyright Act when "(1) the work at issue is within the subject matter of copyright as defined in §§ 102 and 103 of the Copyright Act, and (2) the state law created right is equivalent to any of the exclusive rights within the general scope of copyright as specified in § 106." (citing *Harper & Row, Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 200 (2d Cir.1983)). Thus, for copyright preemption to apply not only must the subject matter at issue be within the subject matter of copyright, but the right sought under state law must be equivalent to the exclusive rights under the scope of copyright.[29] *See e.g., National Car Rental*, 991 F.2d at 428-29 (holding that while the computer program at issue was within the subject matter of copyright, the right sought under state law pursuant to a license was not equivalent to the exclusive rights under copyright; as such, copyright preemption did not apply). The court

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[29] Article I, Sec. 8 of the Constitution provides that: "The Congress shall have Power . . . to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

"The enactment of copyright legislation by Congress under" the Copyright and Patent Clause of the United States Constitution, Article I, § 8, clause 8, is based upon "the ground that the welfare of the public will be served and progress of science and useful arts will be promoted." *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 n. 10, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984).

will, therefore, first consider whether the subject matter at issue in the matter under consideration is within the subject matter of copyright.

2. Subject Matter Element of Copyright Preemption:

The Supreme Court has made it clear that "it is beyond dispute that compilations of facts are within the subject matter of copyright." *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991). The Court held in *Feist* that "copyright law seems to contemplate that compilations which consist exclusively of facts are potentially within its scope." *Id.* On the other hand, it has been suggested that a person's *identity* or *persona* is not within the subject matter of copyright. M. Nimmer, Nimmer on Copyright, § 1.01[B][1][c] ("A persona is not a 'writing' of an 'author' within the meaning of the Copyright Clause . . . A fortiori, it is not a 'work of authorship' under the Act . . . Because the content of the protected right does not fall within the subject matter of copyright, there is no categorical preemption of the right of publicity"). *See also Downing*, 265 F.3d at 1003-04; *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 623 (6th Cir.2000). This court has found above that CBC's use of the names and playing records of Major League baseball players in the context of this case does not involve the identity or persona of the players. However, clearly the baseball players' names as used in conjunction with their playing records in CBC's fantasy baseball games involve compilations of facts. Therefore, the court finds that *Feist* controls and will assume, arguendo, that the names and playing records of Major League baseball players in the

context of this case is within the subject matter of copyright. *Feist*, 499 U.S. at 345, 111 S.Ct. 1282.

3. Copyrightable Element of Preemption:

While the compilations of facts in this case are within the subject matter of copyright, if they do not meet the second prong of the test articulated in *National Car Rental*, 991 F.2d at 428-29, copyright preemption will not apply. *See also National Basketball Ass'n v. Motorola*, 105 F.3d 841, 847-48 (2d Cir.1997) (holding that broadcasts of National Basketball Association games are copyrightable but that the games themselves are not copyrightable; as such copyright preemption did not apply). Thus, the court must determine whether the players' names and playing records as used by CBC are copyrightable. *See Nat'l Car Rental*, 991 F.2d at 428-29.

Facts themselves are not copyrightable because "[t]he *sine qua non* of copyright is originality." *Feist*, 499 U.S. at 345, 111 S.Ct. 1282. As such, one "who accuses another of infringement" must prove "'originality, [ ] intellectual production, [ ] thought, and conception.'" *Id.* at 346-47, 111 S.Ct. 1282 (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58, 4 S.Ct. 279, 28 L.Ed. 349 (1884)). "'No one may claim originality as to facts.'" *Feist*, 499 U.S. at 347, 111 S.Ct. 1282 (quoting *Nimmer*, § 2.11[A], p. 2-157). "Facts, whether alone or as a part of a compilation, are not original and therefore may not be copyrighted."[30] *Id.* at 350, 111 S.Ct. 1282. Indeed,

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[30] The Court noted in *Feist*, 499 U.S. at 350-51, 111 S.Ct. 1282, that "a factual compilation is eligible for copyright if it features an original selection or arrangement of facts, but the copyright is limited to the particular selection or arrangement. *In no event may copyright extend to the facts themselves.*" *See also Kregos v. Associated Press*, 937 F.2d 700, 703 (2d Cir.1991).

"[t]he most fundamental axiom of copyright law is that '[n]o author may copyright his ideas or the facts he narrates.'" *Id.* at 345, 111 S.Ct. 1282. "[F]acts do not owe their origin to an act of authorship. . . . . The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence." *Id.* at 347-48, 111 S.Ct. 1282.

With these principles in mind the Supreme Court held in *Feist,* 499 U.S. at 361-62, 111 S.Ct. 1282, that names, towns, and telephone numbers which are listed in a telephone directory are not copyrightable.[31] Likewise, census data "does not trigger copy-

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[31] In support of its position that copyright preemption is applicable in the matter under consideration CBC relies on *Baltimore Orioles, Inc. v. Major League Baseball Players Association,* 805 F.2d 663, 676 (7th Cir.1986). The Second Circuit in *National Basketball Association v. Motorola,* 105 F.3d 841, 846 (2d Cir.1997), criticized the conclusion of the court in *Baltimore Orioles* that organized sporting events are themselves c pyrightable because they contain "'the modest creativity required for copyright ability.'" The court in *Motorola* explained that the court in *Baltimore Orioles* was, perhaps, not suggesting that the underlying games, which can be played without being telecast, are copyrightable but only that the telecasts are copyrightable. In support of this interpretation of *Baltimore Orioles,* the Second Circuit, in *Motorola,* cited the Seventh Circuit's statement in *Baltimore Orioles* that "'even if the [p]layers' performances were not sufficiently creative, the [p]layers agree that the cameramen and director contribute creative labor to the telecasts.'" 105 F.3d at 846-47 (citing *Baltimore Orioles,* 805 F.2d at 669 n. 7).

Further, as noted by the Fifth Circuit in *Brown v. Ames,* 201 F.3d 654, 659 (5th Cir.2000), *Baltimore Orioles* "has been heavily criticized for holding that a baseball game is a protectable work of authorship simply because the performance was recorded on videotape that was itself copyrightable." (citing *Nimmer,* supra, §§ 1.01[B][1][c] and 2.09[F]; David E. Shipley, Three Strikes and They're Out at the Old Ball Game:

right because these data are not 'original' in the constitutional sense." *Id.* at 347-48, 111 S.Ct. 1282 (citing Nimmer, § 2.03). Also, "scientific, historical, biographical, and news of the day" may not be copyrighted and are part of "the public domain available to every person." *Id.* at 348, 111 S.Ct. 1282 (citation omitted). *See also Motorola*, 105 F.3d at 847-48 (holding that while broadcasts of basketball games are copyrightable, "the *scores* [of basketball games] represent *purely factual information* which any patron of an NBA game could acquire from the arena"; as such, "the underlying games are not" copyrightable) (emphasis added).[32]

Preemption of Performers' Rights of Publicity under the Copyright Act of 1976, 20 Ariz. St. L.J. 369, 384-88 (1988); Shelley Ross Saxer, *Baltimore Orioles, Inc. v. Major League Baseball Players Association:* The Right of Publicity in Game Performances and Federal Copyright Preemption, 36 U.C.L.A. L.Rev. 861, 870 (1989)).

Also, *Morris Communications Corporation v. PGA Tour Inc.*, 117 F.Supp.2d 1322 (M.D.Fla.2000), is factually distinguishable from the matter under consideration because the statistics at issue in *Morris* were derived from *real-time* golf scores and were *time sensitive* while the playing records used by CBC are not time sensitive in the same sense. The court in *Morris* noted that the facts of *Motorola* were distinguishable from those in *Morris* because the defendants in *Motorola* "were able to gather their information simply by tuning in to a publicly-aired television or radio broadcast" while the plaintiff in *Morris* was not able to so easily access the information which it sought to publish. *Id.* at 1329.

[32] *Motorola* involved Motorola's sale of subscriptions for a device known as a SportsTrax which displayed up to date information on the scores and statistics from the games of the National Basketball Association ("NBA") as the games were in progress. Motorola updated the information on a minute by minute basis thus allowing individuals to track games nationwide. To obtain the necessary statistics, Motorola used infor-

This court has found above that the names and playing records of Major League Baseball players in the context of CBC's fantasy games are factual information which is otherwise available in the public domain, including newspaper box scores. As further noted above, newspaper box scores include players' hits, runs, doubles, triples, etc., which data is likewise provided by CBC. See CBC's Ex. 16E attached hereto. Moreover, as stated above, any person attending a baseball game has access to players' playing records as provided by CBC. CBC's use of the players' names in conjunction with the players' records involves "'purely factual information which any patron of [a baseball] game could acquire'" from watching a game or reading the newspaper. *Motorola*, 105 F.3d at 847 (quoting district court decision, 939 F.Supp. at 104). Clearly, the names and playing records of Major League Baseball players as used by CBC in its fantasy baseball games are akin to the names, towns and telephone numbers in a phone book, to census data, and to news of the day. *See Feist*, 499 U.S. at 347-48, 111 S.Ct. 1282. Most significantly, players' names and playing records as used in CBC's fantasy games do not involve the *sine qua non* of copyright—originality. *See id.* at 345, 111 S.Ct. 1282. CBC's fantasy games use players' names and records from baseball games; CBC does not utilize the broadcasts of games themselves; CBC

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mation provided by reporters employed by Sports Team Analysis and Tracking Systems, a company which monitored games via television and radio. In its lawsuit, the NBA alleged that SportsTrax violated its federal copyright in the underlying game by transmitting game statistics and that SportsTrax infringed the NBA's copyright in the broadcast of the basketball games. *Motorola*, 105 F.3d at 843.

utilizes factual data from the underlying games.[33] *See Motorola*, 105 F.3d at 846. Indeed, CBC's fantasy games rely upon "only *facts*" which result from the playing of baseball games, "not the expression or description of the game." *Id.* (emphasis added). This court finds, therefore, that, while the players' names and playing records in the context of CBC's fantasy games are arguably within the subject matter of copyright, the players' names and playing records as used by CBC in its fantasy games are not copyrightable. As such, the court further finds that copyright preemption does not apply in the matter under consideration. *See Feist*, 499 U.S. at 361-62, 111 S.Ct. 1282; *Motorola*, 105 F.3d at 847-48; *Nat'l Car Rental*, 991 F.2d at 428-29.

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[33] The court in *Motorola*, 105 F.3d at 846, recognized the practical problems which would arise were it to be determined that a sporting event itself was copyrightable. For example:

> If the inventor of the T-formation in football had been able to copyright it, the sport might have come to an end instead of prospering. Even where athletic preparation most resembles authorship—figure skating, gymnastics, and, some would uncharitably say, professional wrestling—a performer who conceives and executes a particularly graceful and difficult—or, in the case of wrestling, seemingly painful—acrobatic feat cannot copyright it without impairing the underlying competition in the future.

Id.

As further noted by the court in *Motorola*, 105 F.3d at 846, were games themselves copyrightable, problems would be created by the number of persons and entities who could claim joint ownership of the games. (citing 1 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 2.09[F] at 2-170.1 (1996)) ("[T]he number of joint copyright owners would arguably include the league, the teams, the athletes, umpires, stadium workers and even fans, who all contribute to the 'work.'").

D. The 2002 License Agreement:

The Players Association and Advanced Media contend that by operating its fantasy games without a license CBC is violating the 2002 Agreement pursuant to which CBC agreed not to use in any way the rights which were the subject of the 2002 Agreement beyond the term of the Agreement. Doc. 45, Argument at 9-10; Doc. 111 at 27.

Indeed, the 2002 Agreement stated that upon its termination CBC would have no right to use the Players' Rights. As stated above, the 2002 Agreement warranted that the Players' Association had the authority to grant the licensed rights, included a no-challenge provision in this regard, and defined Players' Rights to include players' names and playing records.[34] CBC argues, however, that the Players' Association did not possess the right to license use of players' names in conjunction with the players' playing records in the context of CBC's fantasy games and that, therefore, the Players' Association does not have the right to enforce the 2002 Agreement's prohibition against CBC's use of the players' names and playing records without a license as well as its no-challenge provision. CBC further argues that these provisions are void as a matter of public policy. Doc. 111 at 36 (citing *Lear, Inc. v. Adkins*, 395 U.S. 653, 670, 89 S.Ct. 1902, 23 L.Ed.2d 610 (1969); *Idaho Potato Comm'n v. M & M Produce Farm & Sales*, 335 F.3d 130, 136 (2d Cir.2003); *Idaho Potato Comm'n v. G & T Terminal Packaging*, 425 F.3d 708, 715 (9th Cir.2005)).

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[34] As noted above, the concept of Players' Rights is considerably broader than the issues which the parties have agreed and admitted are at issue in this case.

First, to the extent the Players' Association and Advanced Media contend that CBC agreed not to use players' *identities* after the term of the 2002 Agreement, the court has found above that CBC has not and is not using players' identities in its fantasy games. Moreover, the Players' Association and Advanced Media have acknowledged, as noted above, that CBC can lawfully use players' playing records; they merely contend that CBC cannot use players' names. As emphasized many times by this court, players' records mean nothing without names; the records must be used in conjunction with players' names. Thus, the court will proceed to determine whether the provisions of the 2002 Agreement which CBC challenges are enforceable.

In regard to a license of a patent, "licensees may avoid further royalty payments, regardless of the provisions of their contract, once a third party proves that the patent is invalid."[35] *Lear*, 395 U.S. at 659, 667, 89 S.Ct. 1902 (citation omitted). "Licensee estoppel"[36] is not applicable where the "strong federal

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[35] The Court in *Lear*, 395 U.S. at 669, 89 S.Ct. 1902, noted, however, that in a situation where parties enter into a license agreement prior to the issuance of a patent, "by accepting a license and paying royalties for a time, the licensee may have avoided the necessity of defending an expensive infringement action during the period when he may be least able to afford one. Second, the existence of an unchallenged patent may deter others from attempting to compete with the licensee."

[36] The Second Circuit in *Idaho Potato Commission v. M & M Produce Farm & Sales*, 335 F.3d 130, 135 (2d Cir.2003), stated that the "general rule of licensee estoppel provides that when a licensee enters into an agreement to use the intellectual property of a licensor, the licensee effectively recognizes the validity of that property and is estopped from contesting its validity in future disputes."

policy favoring the full and free use of ideas in the public domain" outweighs the public interest against the "competing demands of patent and contract law." *Id.* at 675, 89 S.Ct. 1902. As articulated by the Supreme Court in *Lear:*

> Surely the equities of the licensor do not weigh very heavily when they are balanced against the important public interest in permitting full and free competition in the use of ideas which are in reality a part of the public domain. Licensees may often be the only individuals with enough economic incentive to challenge the patentability of an inventor's discovery. If they are muzzled, the public may continually be required to pay tribute to would-be monopolists without need or justification. We think it plain that the technical requirements of contract doctrine must give way before the demands of the public interest in the typical situation involving the negotiation of a license after a patent has issued.

Id. at 670-71, 89 S.Ct. 1902.

Thus, *Lear* suggests that if the Players' Association, as a licensor, did not have the authority to license the players' names and playing records, the federal public policy of permitting and encouraging full and free competition of ideas takes precedence over the 2002 Agreement's prohibiting CBC's use of the names and playing records in the absence of a license.

In response to the argument that *Lear* is not applicable to the matter under consideration because it is a patent case, CBC argues, and this court agrees, that subsequent authority has extended *Lear* beyond the context of patent law. In *M & M Produce*, 335

F.3d at 131-32, the court considered the argument "that [a] no-challenge provision [in a license agreement] should not be enforced because it violate[d] the public policy embodied in the Lanham Act" and concluded that "'there can be no licensee estoppel involving a certification mark.'" *Id.* at 135 (citations omitted).[37] Upon considering the applicability of *Lear,* the court in *M & M Produce*, 335 F.3d at 137, noted that "*Lear* itself recognized that federal policy embodied in the law of *intellectual property* can trump even explicit contractual provisions. . . . *Lear* makes clear that courts should weigh the federal policy embodied in the law of *intellectual property* against even explicit contractual provisions and render unenforceable those provisions that would undermine the public interest." (emphasis added).

Upon concluding that *Lear* was applicable, the Second Circuit held in *M & M Produce*, 335 F.3d at 136, that courts have "recognized that agreements related to *intellectual property* necessarily involve the public interest and have enforced such agreements only to the extent that enforcement does not result in a public injury." (emphasis added) (citing *T & T Mfg. Co. v. A.T. Cross Co.*, 587 F.2d 533, 538 (1st Cir.1978)) ("[A]sk[ing] 'whether there is any significant harm to the public' before holding that a settlement agreement related to trademarks was

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[37] In *State of Idaho Potato Commission v. G & T Terminal Packaging*, 425 F.3d 708 (9th Cir.2005), the court explained the difference between certification marks and trademarks. The Ninth Circuit noted that the policy behind *trademarks* is to "protect the public from confusion by accurately indicating the source of a product." *Id.* at 715. On the other hand, the policy behind *certification* marks is "to signify that a product or service has a certain characteristic." *Id.* Both *M & M Produce*, 335 F.3d 130, and *G & T Terminal* involved certification marks.

enforceable"; *VISA Int'l Serv. Assn. v. Bankcard Holders of America*, 784 F.2d 1472, 1473 (9th Cir.1986) ("'In general, a party entering into a settlement agreement with respect to a trademark will be held to his contract unless enforcement of the contract would result in injury to the public through confusion.'") (citation omitted). Thus, this court finds *M & M Produce* unequivocally extends *Lear* to cases involving intellectual property other than those involving patents and to licenses which include a no-challenge provision. *See also G & T Terminal Packaging*, 425 F.3d at 717-18 (holding that *M & M Produce* properly applied the *Lear* balancing test) (citing *MWS Wire Indus., Inc. v. California Fine Wire Co., Inc.*, 797 F.2d 799, 803 (9th Cir.1986)); *VISA*, 784 F.2d at 1473; *T & T Mfg.*, 587 F.2d at 538; *Beer Nuts Inc. v. King Nut Co.*, 477 F.2d 326, 329 (6th Cir.1973)).

Advanced Media argues that *Lear* is not applicable in the matter before this court because it involves the right of publicity which is a creature of state and not federal law; as such, the strong federal interest as expressed in patent matters is not present. Doc. 111 at 29. In *Zacchini*, 433 U.S. at 573, 97 S.Ct. 2849, however, the Supreme Court held that in matters involving the right of publicity "the State's interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors and having little to do with protecting feelings or reputation." Thus, *Zacchini* establishes that *Lear* and its progeny are applicable to the matter under consideration where the players claim the right of publicity. As such, the public interests embodied in intellectual property law and those embodied in the right of publicity must be balanced to determine whether the challenged

provisions of the 2002 Agreement should be enforced. *See Lear*, 395 U.S. at 674, 89 S.Ct. 1902; *G & T Terminal Packaging*, 425 F.3d at 717-18; *M & M Produce*, 335 F.3d at 133.

Upon applying the *Lear* balancing test, the court must balance the concern for the demands of contract law against the concern for full and free use of ideas in the public domain. *See G & T Terminal Packaging*, 425 F.3d at 717-18; *M & M Produce*, 335 F.3d at 138. The interest in maintaining free competition is "akin to the public interest in the 'full and free use of ideas in the public domain' embodied in the patent laws." *Id.* at 139 (citation omitted). The court has addressed in detail above the significance of the free use of ideas in the public domain in regard to CBC's use of players' names and playing records. As such, the public interest in ensuring free competition is of great concern in the matter under consideration. As also discussed above, in the context of a claim of the right of publicity, the court has considered that the public has an interest in the dissemination of information. *See Gionfriddo*, 94 Cal.App.4th at 409, 114 Cal.Rptr.2d 307. Indeed, CBC's fantasy games involve the dissemination of information. As stated above, players' names and playing records as used in CBC's fantasy games are in the public domain and the playing records are merely facts which are accessible to the general public. Moreover, the playing records represent baseball history.

This court has concluded above that the First Amendment is applicable to CBC's claim that it is not required to have a license to use players' names and playing records in its fantasy games and that the First Amendment, in fact, prevails over the players'

claimed right of publicity. Were the court to give effect to the no-challenge provision in the 2002 Agreement and to the provision prohibiting CBC from using the players' names and playing records without a license, information which is otherwise readily accessible would be removed from the public domain and CBC's First Amendment rights would be infringed.[38] As such, balancing the interests in favor of CBC would facilitate enforcement of the First Amendment.

This court has also noted above that Major League baseball players make a living from playing baseball and from endorsements; that they are well compensated for these endeavors; but that CBC's use of players' names and records in its fantasy games does not go to the heart of the players' ability to earn a living. *See Cardtoons*, 95 F.3d at 974. As such, balancing the interests in the matter under consideration in favor of CBC would have little impact on either the players' ability to earn a living or on their incentive for achievement. *See id.*

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[38] *Aronson v. Quick Pencil Co.*, 440 U.S. 257, 99 S.Ct. 1096, 59 L.Ed.2d 296 (1979), upon which the Players' Association relies in support of its position that the 2002 Agreement controls is clearly distinguishable from the matter under consideration as *Aronson* involved a *current* licensee who claimed that he was not bound by a license agreement because a patent application was rejected during the term of the license. Significantly, *Aronson*, unlike the matter under consideration, did not implicate the First Amendment or information which is in the public domain; *Aronson* involved a license for the manufacture and sale of a keyholder. The court in *Aronson* specifically noted that the contractual provision at issue did not "withdraw any idea from the public domain." *Id.* at 263, 99 S.Ct. 1096. As noted above in the court's discussion of the right of publicity and in the court's discussion of the First Amendment, the contrary is true in the matter under consideration.

The court, therefore, finds that in the circumstances of this case "the strong federal policy favoring the full and free use of ideas in the public domain" as manifested in the laws of intellectual property prevails over the challenged contractual provisions in the 2002 Agreement. *See M & M Produce*, 335 F.3d at 137. As such, the court further finds that the no-challenge provision in the 2002 Agreement[39] and the provision which prohibits CBC from using players' names and/or playing records without acquiring a license are unenforceable and void as a matter of public policy. *See Lear*, 395 U.S. at 674, 89 S.Ct. 1902; *G & T Terminal Packaging*, 425 F.3d at 717-18; *M & M Produce*, 335 F.3d at 132-36; *T & T Mfg.*, 587 F.2d at 538.

IV.

CONCLUSION

For the reasons more fully set forth above, the court finds that the undisputed facts establish that the players do not have a right of publicity in their names and playing records as used in CBC's fantasy games and that CBC has not violated the players' claimed right of publicity. The court further finds, alternatively, that even if the players have a claimed right of publicity, the First Amendment takes precedence over such a right. The court further finds that the undisputed facts establish that the names and playing records of Major League baseball players as used in CBC's fantasy games are not copyrightable and, therefore, federal copyright law does not preempt the players' claimed right of publicity. Addi-

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[39] The court's finding in regard to the validity of the no-challenge provision in the 2002 Agreement addresses that provision only to the extent it addresses CBC's use of players' names and playing records.

tionally, the court finds that the no-challenge provision of the 2002 Agreement between CBC and the Players' Association and the provision of this Agreement which prohibits CBC from using players' names and playing records after the expiration of the Agreement are unenforceable based on public policy considerations. The court finds, therefore, that declaratory judgment should issue in CBC's favor. As such, the court will order the Players' Association and Advanced Media to refrain from interfering with CBC's fantasy games in the manner proscribed by this court's decision.

Accordingly,

IT IS HEREBY ORDERED that CBC's Motions for Summary Judgment are **GRANTED**; [Doc. 72, Doc. 107]

IT IS FURTHER ORDERED that the Players' Association and Advanced Media not interfere with CBC's using players' names and playing records on its website and in its fantasy baseball games in the manner presented in this case;[40] [Doc. 1]

IT IS FURTHER ORDERED that the Motion for Summary Judgment filed by the Players' Association is **DENIED**; [Doc. 44]

IT IS FURTHER ORDERED that the Motion for Summary Judgment filed by Advanced Media is **DENIED**; [Doc. 87]

IT IS FURTHER ORDERED that the counter-claims filed by Advanced Media are **DISMISSED**; [Doc. 7]

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[40] The court clarifies that this Memorandum Opinion only applies to those aspects of CBC's website which are before the court.

IT IS FURTHER ORDERED that the counterclaims filed by the Players' Association are **DISMISSED**; [Doc. 26]

IT IS FURTHER ORDERED that a separate judgment shall be entered which incorporates by reference this Memorandum Opinion.

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APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 06-3357

C.B.C. DISTRIBUTION AND MARKETING, INC.,

v.

MAJOR LEAGUE BASEBALL ADVANCED MEDIA, L.P. and THE MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,

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MAJOR LEAGUE BASEBALL ADVANCED MEDIA, L.P., THE MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,
Appellant,

v.

C.B.C. DISTRIBUTION AND MARKETING, INC.,
Appellee.

NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION and NATIONAL FOOTBALL LEAGUE PLAYERS, INCORPORATED,
Amici on behalf of Appellant,

FANTASY SPORTS TRADE ASSOCIATION, et al.,
Amici on Behalf of Appellee,

NBA PROPERTIES,, INC., et al.,
Amici on behalf of Appellant.

No: 06-3358

C.B.C. DISTRIBUTION AND MARKETING, INC.,

v.

MAJOR LEAGUE BASEBALL ADVANCED MEDIA, L.P. and THE MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,

MAJOR LEAGUE BASEBALL ADVANCED MEDIA, L.P.,
Appellant,

THE MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,

v.

C.B.C. DISTRIBUTION AND MARKETING, INC.,
Appellee.

FIRST AMERICAN REAL ESTATE SOLUTIONS, et al.,
Amici on Behalf of Appellee,

NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION and NATIONAL FOOTBALL LEAGUE PLAYERS, INCORPORATED,
Amici on behalf of Appellant,

FANTASY SPORTS TRADE ASSOCIATION,
Amicus on Behalf of Appellee,

NBA PROPERTIES INC., et al.,
Amici on behalf of Appellant.

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:05-CV-00252-MLM)
(4:05-cv-00252-MLM)

ORDER

The petitions for rehearing en banc are denied. The petitions for rehearing by the panel are also denied.

November 26, 2007

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

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No. 07-1099

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

MAJOR LEAGUE BASEBALL ADVANCED MEDIA and THE MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,

Petitioners,

v.

C.B.C. DISTRIBUTION AND MARKETING, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

NEIL M. RICHARDS
Associate Professor of Law
WASHINGTON UNIVERSITY
SCHOOL OF LAW
Campus Box 1120
One Brookings Drive
St. Louis, Missouri 63130
(314) 935-4794
(314) 935-5356 Facsimile

RUDOLPH A. TELSCHER, JR.
Counsel of Record
KARA R. YANCEY
MOLLY B. EDWARDS
HARNESS, DICKEY & PIERCE, PLC
7700 Bonhomme Avenue
Suite 400
St. Louis, Missouri 63105
(314) 726-7500
(314) 726-7501 Facsimile

Attorneys for Respondent

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215494

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

(1) Did the Eighth Circuit, applying settled Supreme Court precedent, properly conclude that under the facts of this case, Missouri's state law of publicity could not create property rights in historical newsworthy facts without violating the First Amendment?

(2) Did the Eighth Circuit, in interpreting an expired contract under New York State law, properly interpret the 2002 licensing agreement between the Players Association and CBC and conclude that the Players Association breached a material obligation of the licensing agreement rendering certain provisions unenforceable against CBC?

CORPORATE DISCLOSURE STATEMENT

Respondent C.B.C. Distribution and Marketing, Inc. ("CBC") is a Missouri corporation. It has no parent company and no publicly-held company owns 10% or more of CBC.

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INTRODUCTION

Major League Baseball Advanced Media ("Advanced Media") and the Major League Baseball Players Association (the "Players Association") (collectively for purposes of this opposition brief, "Baseball"), would have this Court believe that the Eighth Circuit's decision below will have devastating world consequences and, without this Court's intervention, rights of publicity will be forever changed and commercial licensing agreements will be unenforceable. Nothing so dramatic is at stake. This case involves a nontraditional rights of publicity claim asserted by the Players Association, which the Eighth Circuit properly ruled is preempted by the First Amendment, and state-law contract interpretation.

C.B.C. Distribution & Marketing, Inc. ("CBC") commenced this action, seeking declaratory relief that it did not need a license from Baseball to use player statistics in the operation of its fantasy baseball games. On the insistence of the Players Association and its marketing partners, CBC had previously entered into a license agreement with the Players Association that, among other things, purported to include these rights. After the Players Association licensed these purported rights to Advanced Media, and Advanced Media refused to license CBC, CBC took the only action it could; it sought a declaration of its rights in court.

In affirming the District Court's decision that CBC, in fact, did not need a license to operate its fantasy games, the Eighth Circuit applied well-settled Supreme Court law, balancing the rights of publicity at issue

against the First Amendment as directed by this Court in *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977). The Eighth Circuit additionally held that as a matter of New York State contract law, the expired license agreement between the Players Association and CBC did not preclude CBC from using, and challenging Baseball on the right to use player statistics.

Congruent with Supreme Court precedent, the Eighth Circuit properly balanced CBC's First Amendment interests against Baseball's alleged publicity rights. Baseball now as a last ditch effort, seeks review by this Court because the lower courts' decisions were unfavorable to Baseball. This is not a proper basis for granting Baseball's Petition for Writ of *Certiorari.*

As to the contract issue, Baseball strays far from the Eighth Circuit's actual holding in an unconstrained effort to make this case appear worthy of this Court's attention. The Eighth Circuit concluded that based on New York State contract law, the contract terms at issue were unenforceable against CBC as a result of the Players Association's breach of a specific warranty provision in that contract. Baseball's only complaint is with the *application* of correctly stated law. Without a split of authority, legal error, or any erroneous factual finding, this is not a *certiorari*-worthy issue. *See* Supr. Ct. R. 10. For all of these reasons, and as set forth more fully below, *certiorari* should be denied.

STATEMENT OF THE CASE

The Licensing Agreement Between CBC and the Players Association

In 1991, three colleagues formed CBC, a small Missouri company offering fantasy sports games. CTA App. 489-90, ¶¶4, 6, 9; CTA App. 322, ¶¶6-7; CTA App. 1072-73, ¶¶4, 8-9. In 1993, after operating for approximately two years without a license or even a letter from baseball, CBC started operating its fantasy baseball games exclusively through *The Sporting News*, a popular periodical for baseball aficionados. CTA App. 493-94, ¶25. To the best of CBC's knowledge, in 1994 or 1995, the Players Association engaged in licensing discussions with *The Sporting News*. *Id.* CBC never believed that a license was necessary from any Major League Baseball entity or from the Players Association because CBC used only publicly available statistics and because no one involved with Major League Baseball, any of its affiliates, or any Major League Baseball player, had any role in the origination of fantasy baseball. CTA App. 493, ¶24. CBC, however, felt pressured to take a license to ensure the continuation of its business with *The Sporting News*. CTA App. 493-94, ¶¶25-26. Thus, in 1995, CBC ultimately agreed to pay 9% of the wholesale price of its game entries in exchange for a license. *Id.*; CTA App. 877-916.

After the first licensing agreement lapsed, CBC ultimately renewed its license in 2002, the agreement at issue, to again avoid the potential loss of a powerful business arrangement, this time with *USA Today*. Like

the first, CBC entered into this licensing agreement because the Players Association asserted and warranted in the agreements, that it owned the rights at issue and claimed CBC needed a license. CTA App. 917-933. As indicated by the provisions directed to the quality of the endorsement material and approval process of promotional materials, the licensing agreement was a form agreement used by the Players Association in its licensing of player merchandise and contained a variety of provisions favorable to the Players Association, including the in perpetuity no-contest clause at issue in this case. *Id.* at 925. The agreement was not an arms-length negotiation between entities with equal bargaining power.

Baseball Repeatedly Refused to Acknowledge Any Player Rights in Statistics

Major League Baseball Advanced Media was formed in 2000 by the various owners of the Major League Baseball teams and was, among other things, in charge of running MLB.com, Major League Baseball's Internet site. CTA App. 760 at 8:5-13; *see also* CTA App. 936-937. Between 2001 and January 2004, Advanced Media offered fantasy baseball games on MLB.com, but it did so without ever obtaining a license or permission from the Players Association, because Advanced Media expressly did not acknowledge the players' rights in statistics. CTA App. 747 at 38:17-20; CTA App. 753-54 at 47:7-20; CTA App. 1061 (Advanced Media telling the Players Association that "[n]umbers may be a grey area that we should discuss" and "we feel

like stats in this context are not subject to a MLBPA license").[1]

In January 2005, however, Advanced Media agreed to purchase from the Players Association certain interactive rights, which allegedly included fantasy baseball games. CTA App. 955-74. It was then that Major League Baseball and Advanced Media changed its position regarding the players' rights in the use of players' statistics in fantasy sports. *Compare* CTA App. 938 with CTA App. 749-51 at 40:25-43:11.

Advanced Media Refused to Grant CBC a License to Run its Fantasy Games

On the same day that the agreement between Advanced Media and the Players Association was announced, January 19, 2005, Advanced Media wrote to CBC, stating that CBC must immediately cease offering its fantasy baseball games, pending consideration of proposals for the upcoming season. CTA App. 496-97, ¶34. In response to the letter, CBC

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1. Advanced Media's former position that statistics are not owned by any party was further articulated by Major League Baseball in a case decided in the California courts. *See Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400 (2001). In that case, Major League Baseball, without permission, used the names, photographs and performance records of former Major League Baseball players on their website and in products such as program brochures and videotapes, several of which were sold for profit. *Id.* at 406. When the former players sued MLB and others for violating their rights of publicity, MLB argued that the use of players' statistics was protected by the First Amendment and the California court agreed. *Id.*

prepared and submitted a proposal outlining the games that CBC intended to offer, all of which were games consistent with those offered in the past. CTA App. 497, ¶35. Despite these efforts, Advanced Media refused to grant CBC any license to run its own fantasy baseball games. CTA App. 497, ¶36.

Instead, on February 4, 2005, Advanced Media proposed a one year license for CBC to use MLB league marks on CBC's website ***to market MLB's games*** to CBC's customers in exchange for 10% of related revenue. CTA App. 497, ¶37; CTA App. 975-77. In other words, Advanced Media wanted CBC to cease offering its own fantasy baseball games, and instead market MLB's games.[2] CTA App. 497, ¶37. The essence of this was for CBC to receive a one-time 10% commission in exchange for turning over all of its customers to Advanced Media and thereafter be out of the business. *Id.*

The Litigation

Without the possibility of license and threats from a large entity like Baseball, CBC was forced to file a Complaint for declaratory judgment against Advanced Media that it, among other things, was free to use player statistics in its fantasy games. Subsequently, the Players Association intervened in the litigation and all three parties moved for summary judgment.

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2. This was in furtherance of Advanced Media's plan to have only a handful of large businesses providing fantasy baseball through licenses with Advanced Media. *See* CTA App. 978-1060; CTA App. 757-58 at 136:9-19; Appellee CTA App. 1163-1213.

The Decisions Below

In August 2006, the District Court granted summary judgment to CBC. It held that the Players Association did not have a Missouri common law right of publicity in publicly available statistics, and that even if CBC were infringing the players' rights of publicity, CBC's First Amendment interests outweighed the players' rights of publicity in publicly available statistics. Dist. Ct. Memo. at 21-22. On summary judgment, CBC had argued in the alternative that Baseball's asserted rights of publicity were preempted by federal copyright law. *Id.* at 35. The District Court, however, rejected this argument finding no preemption. *Id.* at 35. Finally, the District Court, relying on *Lear Inc. v. Adkins*, 395 U.S. 653 (1969), held that no-use and no-contest provisions in the expired 2002 licensing agreement were unenforceable and void as a matter of public policy. Dist. Ct. Memo. at 46.

On appeal, the Eighth Circuit affirmed.[3] More specifically, the Eighth Circuit held that while CBC's use of statistics satisfied the elements of Missouri's common law right of publicity, applying this Court's decision in *Zacchini*, 433 U.S. at 562, CBC's First

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3. Though Baseball repeatedly refers to a "divided Eighth Circuit" the one dissenting justice on the Eighth Circuit panel agreed with the majority's opinion as to the rights of publicity and the First Amendment, and dissented only as to the contract holding. *Id.* at 14a-16a. According to the dissenting justice, § 8(a) of the licensing agreement did not constitute a warranty of ownership of exclusive rights to use names and statistics in fantasy games and did not render the other provisions unenforceable against CBC. *Id.* at 14a-15a.

Amendment interests outweighed the common law rights of publicity under the facts of this case. Pet. S.C. App. A at 7a-10a. Having so found, the Eighth Circuit declined to address CBC's alternative copyright preemption argument. *Id.* at 10a. As to the contract issue, the Eighth Circuit expressly did not reach the issue of whether *Lear* rendered the no-use and no-contest provisions of the licensing agreement unenforceable as found by the District Court. *Id.* at 11a-12a. Instead, the majority of the court determined that under New York law and, based on a warranty provision in § 8(a) of the licensing agreement, the Players Association could not enforce the contract's no-use and no-contest provisions against CBC. *Id.* at 11a-13a.

REASONS FOR DENYING THE PETITION

I. THE EIGHTH CIRCUIT PROPERLY STATED THE RULE OF LAW OF *ZACCHINI* AND BALANCED THE PUBLICITY RIGHTS AGAINST THE FIRST AMENDMENT RIGHTS AT STAKE.

In *Zacchini*, 433 U.S. at 562, this Court held that common law "rights of publicity" must always be balanced against the First Amendment interests otherwise restricted by the state law. Citing *Zacchini*, the Eighth Circuit in this action did just that; it balanced the players' rights of publicity under Missouri law against the First Amendment interests involved in using publicly available statistics to offer fantasy baseball. In its petition, Baseball does not contend that *Zacchini* is not the applicable law (it clearly is), or that the Eighth Circuit did not apply *Zacchini* (it clearly did).

Rather, Baseball is upset with the *outcome* of that balancing in the case at hand.

Recognizing that this is not a *certiorari*-worthy issue, Baseball contends for the first time in this litigation, that there is confusion in the law and that different *Zacchini* balancing tests, which Baseball now asserts are outcome determinative, abound. As shown in more detail below, however, there is no clearly defined split of authority, and here, in any event the Eighth Circuit articulated the correct law and properly applied it, and for these reasons *certiorari* should be denied.

A. The Supreme Court In *Zacchini* Established The Legal Test For Weighing State-Law Publicity Rights Against First Amendment Interests.

In *Zacchini*, 433 U.S. at 574, all nine Justices perceived the serious First Amendment issues raised by broad readings of rights of publicity. In that case, a human cannonball performer's *entire* act for which admission would normally be charged was broadcast by a local television station in its entirety. *Id.* A majority of five Justices held that where the First Amendment is raised as a defense to a state-law right of publicity claim, the two rights must be weighed against each other to ensure that both rights receive their due. *Id.* Specifically, this Court analyzed the type of right asserted and the amount of appropriation, *i.e.*, whether the news station was reporting newsworthy facts about Zacchini's act, which the First Amendment would trump, or the entire act. Additionally, this Court analyzed the economic and non-economic justifications for weighing in favor of the

state law right of publicity and against the First Amendment interests. In other words, the Supreme Court provided a clear indication of what to consider in conducting the balancing test. Players CTA Br., 35-36 (emphasis added) ("[t]he Supreme Court's analysis *makes clear* that even if CBC's products are somehow classified as 'speech,' CBC's right to 'speak' must be balanced against the state's interest in enforcing publicity rights").

B. The Eighth Circuit Correctly Applied *Zacchini* and Found That Any Rights of Publicity in Publicly Available Statistics Are Outweighed by CBC's Substantial First Amendment Interests At Stake.

The Eighth Circuit in this case, like other federal courts, properly recognized that *Zacchini* requires consideration of the First Amendment interests at stake in a right of publicity action and that it requires rejection of the state law cause of action when the First Amendment interests outweigh the right of publicity at issue. Pet. S.C. App. A at 7a. For this reason, applying the law of *Zacchini*, the Eighth Circuit considered the type of publicity right asserted and the amount of appropriation in the case, (*i.e.*, factual statistics printed in the newspaper everyday). Moreover, the Eighth Circuit analyzed the economic interests, (*i.e.* the fact that baseball players are not affected, at least negatively affected, financially by fantasy baseball) and the absence of non-economic interests weighing in favor of the publicity right (*i.e.* enforcing the right of publicity would not protect natural rights, reward celebrity labors, or avoid emotional harm as the players did not invent

fantasy sports and are not harmed by the publication of on-field performance statistics). Thus, the Eighth Circuit properly determined, consistent with *Zacchini*, that under these circumstances, the First Amendment right of freedom of expression outweighed the interests of the players in controlling the dissemination of their historic, factual playing records in connection with fantasy sports.

C. The Eighth Circuit's Decision Is Not Inconsistent With this Court's Decision in *San Francisco Arts & Athletics*.

Baseball asserts that *certiorari* should be granted because the decision of the Eighth Circuit conflicts with this Court's ruling in *San Francisco Arts & Athletics v. U.S. Olympic Committee*, 483 U.S. 522 (1987), a case cited only in passing in the courts below and a case not involving the right of publicity. Despite its somewhat remote applicability and contrary to Baseball's assertions, the law employed by the Eighth Circuit, and the justifications for its holding, are squarely in line with this Court's analysis in *San Francisco Arts & Athletics*.

In *San Francisco Arts & Athletics* this Court only *reaffirmed* its holding in *Zacchini* that, when faced with a law restricting expression, courts must balance the interest behind the restriction against the magnitude of the speech restriction. Thus, in *San Francisco Arts & Athletics*, this Court examined Congress' interest in limiting, by federal statute, use of the word "Olympic" against the speech interest of the defendant to use the word in connection with a nine day athletic competition dubbed the "Gay Olympics."

Though this Court decided in that instance that the governmental interest outweighed the free speech interest, the Eighth Circuit's decision here is consistent with the analysis employed in *San Francisco Arts & Athletics*. In *San Francisco Arts & Athletics*, the economic incentives to supply the Olympic Committee with the means to raise money through advertising, and the non-economic incentives, to maintain a competition that first began in 776 B.C., and which helps build a better understanding of different cultures and a more peaceful world through international goodwill, outweighed defendant's First Amendment interests in using the exact same image carefully cultivated by the U.S. Olympic Committee. On the other hand, in this case, the Eighth Circuit properly concluded that the players' right to control publicly available statistics and historical facts about the "national pastime" had to give way to the substantial First Amendment right in the free flow of information embodied in fantasy baseball. Notably, while CBC (and other small fantasy sports companies) could not operate without use of the publicly available statistics, *San Francisco Arts & Athletics* could hold its sporting event, just not using the word "Olympic" to promote it.

Thus, despite the differences between *San Francisco Arts & Athletics* and the Eighth Circuit's holding in this case, in both instances the interests at stake were properly balanced and applied to the facts of the case. As a result, there is nothing inconsistent about the Eighth Circuit's decision justifying a grant of *certiorari* in this case.

D. The Eighth Circuit's Decision Is Not Inconsistent With the "Game Cases."

Despite articulation of the correct law and proper application, Baseball argues that the employ of the test articulated by this Court in *Zacchini* conflicts with all of the previous "game" cases. The three board game cases (*Uhlaender*, *Rosemont* and *Palmer*) relied on by Baseball, however, are easily distinguishable. First, all of the decisions, the most recent of which is 34 years old, **came before *Zacchini*** and the substantial body of modern case law expanding the protections of the First Amendment to fully embrace information dissemination. *See Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970); *Palmer v. Schonborn Enters., Inc.*, 232 A.2d 458 (N.J. Super. 1967); *Rosemont Enters., Inc. v. Urban Systems, Inc.*, 340 N.Y.S.2d 144 (N.Y. Sup. 1973). Moreover, the Eighth Circuit's decision to employ the *Zacchini* balancing test cannot contravene *Uhlaender* and *Palmer*, when neither case even mentions the First Amendment much less the test to weigh rights of publicity against First Amendment interests. *See Uhlaender*, 316 F. Supp. at 1277; *Palmer*, 232 A.2d at 458. Thus, the Eighth Circuit properly addressed the implications of the First Amendment in the context of fantasy baseball and/or the dissemination of information, and balanced the right of publicity against First Amendment interests as this Court instructed in *Zacchini*.

II. BASEBALL'S ASSERTION OF "CONFLICT AND CONFUSION" IN THE LAW IS OVERSTATED, A CONCLUSION REINFORCED BY THE PLAYERS ASSOCIATION'S AND ADVANCED MEDIA'S CHOICE TO NOT MAKE IT AN ISSUE IN THE COURT BELOW.

Baseball for the first time contends in the petition that the interpretation of the balancing test outlined in *Zacchini* is unclear. In fact, in the Eighth Circuit, the Players Association argued that "[t]he Supreme Court's analysis *makes clear* that even if CBC's products are somehow classified as 'speech,' CBC's right to 'speak' must be balanced against the state's interest in enforcing publicity rights." Players CTA Br., 35-36 (emphasis added).

Furthermore, Baseball claims, again for the first time, that balancing tests proliferate, and Baseball even articulates six formulations of *Zacchini's* balancing test employed by state and federal courts. *Compare* Players CTA Br. at 37 (in which the Players Association informed the court of only four articulations, including the *Restatement (Third) of Unfair Competition* §§46-47 (1995), California's "transformative test", Missouri's "predominant purpose test", and the 10th Circuit factors). Yet, the Players Association argued in its lower court briefing that: "All of these *tests are consistent with Zacchini* and Missouri's test, and all protect the federal interest at stake." Players CTA Br. at 37. In a way to further clarify for the Eighth Circuit, the Players Association concluded that "*[f]ederal and state courts have used different formulations of Zacchini's balancing directive. These tests all protect First Amendment rights, because all focus on the extent to which enforcement of*

the right would impinge upon expression." Players CTA Reply Br. at 17 (citations omitted).

Baseball also now contends that the selection of the balancing test is outcome determinative. This is precisely contrary to their arguments below. Indeed, while the Players Association argued that each of the tests resulted in a favorable outcome to Baseball, it also told the lower court that it did not matter which test the court selected: "[r]egardless of which balancing test this Court uses for weighing the State's interest in enforcing publicity rights against CBC's asserted right to speak, publicity rights should prevail." Players CTA Reply Br. at 2 (citations omitted).[4]

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4. CBC agrees with Baseball's previous contention, *i.e.*, that the court's formulation of *Zacchini*'s balancing test is not outcome determinative. Regardless of what test is applied, the facts of this case when balanced weigh, as the Eighth Circuit and District Court found, in favor of CBC's First Amendment interests. For example, since player names are used in fantasy baseball predominantly to convey information, under the "predominant use" test adopted by the Missouri Supreme Court, CBC's First Amendment rights prevail. CBC's First Amendment rights would also prevail under California's "transformative test." There can be no dispute that the players' names are only one of the raw materials from which on-line fantasy sports games are created. *Kirby v. Sega of America, Inc.*, 144 Cal. App. 4th 47, 58 (Cal. Ct. App. 2006); *see Winter v. DC Comics*, 69 P.3d 473, 479-80 (Ca. 2003). The Restatement test asks whether the use of the name or identity is related to the work as a whole. *See also Restatement* §§46-47. This too would obviously favor CBC's First Amendment rights, as baseball player names and statistics are plainly related to a game where the participants pretend to manage a Major League baseball team. *Cf. Rogers v. Grimaldi, MGM/UA Enter. Co.*, 875 F.2d 994 (2d Cir. 1989).

As an indication of this position, and the minor role the various formulations of the balancing test played in the court below, in the entire oral argument to the Eighth Circuit, Baseball spent just thirty seconds discussing the balancing tests, (predominant purpose, the transformative and Restatement test - not six different tests as Baseball argues now) and concluded that "in each instance what these tests are trying to determine is whether there is any core First Amendment interests such as expressive interests or creative interests at stake." *See* Oral Arg., 31:00 – 33:25.

A. After Claiming All Of the Tests Are Consistent with *Zacchini* And Yield the Same Result In the Courts Below, Baseball Should Be Judicially Estopped From Now Arguing Otherwise.

Judicial estoppel bars a litigant from taking inconsistent positions in litigation. *See New Hampshire v. Maine*, 532 U.S. 742, 749-751 (2001). Here, Baseball, with only self-serving motives to get this Court to hear its case, has done a complete 180 of its previous argument that the various formulations of applying *Zacchini* are all consistent with the same focus, and now argue that there are six different tests. Baseball now contends that these tests vary from the balancing test articulated in *Zacchini*, and that the choice of test results in different outcomes. Given Baseball's stance in the courts below, Baseball should be judicially estopped from asserting this position now.

B. A *Certiorari*-Worthy Split Does Not Exist.

Contrary to its position now, Baseball had it right in the courts below, *i.e.*, though some federal and state courts have used different formulations of *Zacchini*'s balancing directive, all attempt to balance right of publicity laws, which vary among the states, against the interests of the First Amendment. For this reason, a *certiorari*-worthy split of authority on an important issue of law does not exist.

The various formulations applied to balance the First Amendment interests and publicity rights have only developed through the application of *Zacchini* to particular facts, as the factual circumstances in rights of publicity cases vary greatly[5]. As the Players

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5. For example, the use of an Olympic weight lifter's name and likeness on a series of promotional disposable Dixie cups (*Vinci v. American Can Co.*, 591 N.E.2d 793, 794 (Ohio App. 1990)), Major League Baseball's use (like CBC's use in this case) of baseball statistics on its web site and in connection with other products that it sold for profit (*Gionfriddo*, 94 Cal. App. 4th at 400), images of the Three Stooges on a T-shirt (*Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 805 (Ca. 2001)), caricatures of active baseball players on the front and humorous commentary about their careers on the back of trading cards (*Cardtoons L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 962 (10th Cir. 1996)), a painting which commemorates Tiger Woods' victory in the 1997 Masters Tournament (*ETW Corp. v. Jireh Publishing, Inc.*, 332 F.3d 915, 918 (6th Cir. 2003)), a Japanese video game with a character inspired by a real musician (*Kirby*, 144 Cal. App. 4th at 57-58), a comic book character based on the identity of the hockey player, Tony Twist (*Doe v. TCI Cablevision*, 110 S.W.3d 363, 368 (Mo. 2003), *cert. denied*, 540 U.S. 1106 (2004)), a basketball star's

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Association has argued before (and Advanced Media conceded by omitting any reference to different formulations of the balancing test), the various formulations used by a state or federal court are to assist the court in balancing the interests in divergent facts and circumstances, and under different "right of publicity" laws. Courts across the country have used those factors which are relevant to the specific facts of the case, and reached relatively consistent results. *Compare Gionfriddo*, 94 Cal. App. 4th at 410 with *Rogers*, 875 F.2d at 1004. No further clarification by this Court is needed and *certiorari* is not warranted.

Indeed, because the Supreme Court has made clear that the First Amendment interests are to be balanced against state law publicity rights, after *Zacchini*, this Court has denied *certiorari* in cases involving the balance between the First Amendment and state-law rights of publicity. *See Doe*, 110 S.W.3d at 363, *cert. denied*, 540 U.S. 1106; *see also White*, 971 F.2d at 1395, *cert. denied*, 508 U.S. 951. Here, too, *certiorari* should be denied.

Finally, since most publicity cases deal with endorsements and advertising, even if there were a split in authority, a point with which CBC disagrees, this case's fact pattern (the use of statistics in fantasy sports)

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former name in a television car commercial (*Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407, 416 (9th Cir. 1996)), a singer's voice in a radio snack food commercial (*Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1097-98 (9th Cir. 1992)), and a game show hostess' "identity" in print advertisements for electronic products (*White*, 971 F.2d at 1396).

makes it an outlier and a poor vehicle for review of the *Zacchini* balancing test. For all of the aforementioned reasons, *certiorari* should be denied.

III. THE EIGHTH CIRCUIT PROPERLY ARTICULATED AND APPLIED NEW YORK LAW IN RULING THAT THE RESTRICTIVE COVENANTS OF THE 2002 LICENSING AGREEMENT WERE UNENFORCEABLE.

Despite Baseball's assertion to this Court, the Eighth Circuit did *not* hold that "the First Amendment bars enforcement of CBC's no-use and no-challenge obligations." Pet. S.C. Br. at 30. Before the District Court and the Eighth Circuit were at least two reasons for addressing this case on the merits and declining the Players Association's request to not do so because of the restrictive covenants in the expired 2002 license agreement: (1) under this Court's decision in *Lear*, 395 U.S. at 653, the restrictive covenants (non-use and no-contest provisions) were unenforceable because, if enforced, they would allow Baseball to monopolize a massive industry in perpetuity that it played no part in developing; and (2) under basic principles of New York contract law (the law of choice in the agreement), the restrictive covenants were unenforceable. The Eighth Circuit expressly did not address *Lear*, and instead, resolved the issue by employing traditional contract principles of New York state law. Pet. S.C. App. A at 11a-12a ("[w]e do not reach the issue of whether *Lear* is applicable here, though, because we believe that the contested contract terms are unenforceable for a different reason."). Baseball asks this Court to engage in fact-intensive error-correction of a state-law contract

provision. This is, of course, not a credible basis for a grant of *certiorari*.

A. The Eighth Circuit Correctly Stated New York Warranty Law.

In New York, as the Eighth Circuit held, a contractual warranty is defined as "an assurance by one party to a contract of the existence of a fact upon which the other party may rely." Pet. S.C. App. A at 12a (citations omitted). Thus, the Eighth Circuit's review and analysis of the contract under New York law and application of New York's definition of "contractual warranty," which Baseball does not contend was improper, was not legal error.

B. The Eighth Circuit Correctly Applied New York Warranty Law to the Facts of the Case.

In applying New York's definition of "contractual warranty" to the 2002 licensing agreement, the Eighth Circuit properly interpreted §8(a) as a warranty of title provision. *See* Pet. S.C. App. A at 12a-13a. Indeed, in no place in its petition does Baseball argue that the Eighth Circuit's determination that §8(a) is a warranty of title clause is incorrect or in error. Rather, Baseball contends that the Eighth Circuit erred in the conclusion that it *breached* the warranty of title clause under the facts of this case.

At the outset, the Eighth Circuit properly concluded that in light of all the facts, Baseball's warranty that it owned exclusive "right, title and interest" in publicly available statistics in the context of fantasy baseball was

erroneous and a material breach of the contract. The Eighth Circuit's holding, however, is not a matter warranting this Court's review. The decision was based on a particular contract provision as applied to a particular set of facts. In an attempt to bolster the importance of a simple contract interpretation issue, Baseball argues that the Eighth Circuit's holding weakens other contracts or "threatens all contract commitments". Pet. S.C. App. A at 15. Yet, rather than deciding the case under *Lear*, (which arguably may have had broader implications), the Eighth Circuit's holding, based solely on New York state contract interpretation, was limited to the interpretation of the 2002 licensing agreement between the Players Association and CBC. There is no precedential value or broad rule of law that implicates the strength or validity of other licensing agreements. Moreover, the law applied by the Eighth Circuit is not in conflict with any other law, nor does Baseball even suggest a *certiorari*-worthy split of authority here. With no split in authority, legal error, or error in application of the law to the facts, the petition should be denied. *See* S.C. Rule 10.

CONCLUSION

For the foregoing reasons, Baseball's Petition for Writ of *Certiorari* should be denied.

Respectfully submitted,

NEIL M. RICHARDS
Associate Professor
of Law
WASHINGTON UNIVERSITY
SCHOOL OF LAW
Campus Box 1120
One Brookings Drive
St. Louis, Missouri 63130
(314) 935-4794
(314) 935-5356 Facsimile

RUDOLPH A. TELSCHER, JR.
Counsel of Record
KARA R. YANCEY
MOLLY B. EDWARDS
HARNESS, DICKEY
& PIERCE, PLC
7700 Bonhomme Avenue
Suite 400
St. Louis, Missouri 63105
(314) 726-7500
(314) 726-7501 Facsimile

Attorneys for Respondent

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MAJOR LEAGUE BASEBALL ADVANCED MEDIA AND THE MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,
Petitioners,

v.

C.B.C. DISTRIBUTION AND MARKETING, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF

MARY K. BRAZA
G. MICHAEL HALFENGER
FOLEY & LARDNER LLP
777 East Wisconsin Ave.
Milwaukee, WI 53202
(414) 271-2400

STEVEN A. FEHR
DONALD R. AUBRY
JOLLEY, WALSH, HURLEY
RAISHER & AUBRY, P.C.
204 West Linwood Blvd.
Kansas City, MO 64111
(816) 561-3755

VIRGINIA A. SEITZ*
PETER D. KEISLER
QUIN M. SORENSON
SIDLEY AUSTIN LLP
1501 K Street, N.W.
WASHINGTON, D.C. 20005
(202) 736-8000

RUSSELL S. JONES, JR.
TRAVIS A. SALMON
SHUGHART THOMSON
& KILROY, P.C.
120 West 12th Street
Kansas City, MO 64105
(816) 421-3355

Counsel for Petitioners

* Counsel of Record

May 12, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTRODUCTION

CBC's Opposition Brief ("Opp.") mischaracterizes the facts and proceedings below, seeking to persuade this Court not to resolve the mature conflict of law presented by the petition. This case does not involve "property rights in historical newsworthy" facts, Opp. i, or "First Amendment interests . . . in using publicly available statistics," *id.* at 8. MLBPA and Advanced Media challenge neither CBC's reporting of baseball news nor its publication of statistics. Petitioners claim that, without consent and in violation of its contractual obligations, CBC incorporates Major League players' identities into predictive games – fantasy baseball products – in which customers pay to speculate on players' future achievements.

Moreover, the petition is *not* the first time petitioners have described the lower courts' varying tests for addressing the interplay of publicity rights and the First Amendment. Petitioners described a number of the tests in the Eighth Circuit, arguing that they should prevail under each; these arguments are wholly consistent with those in the petition. Further, CBC utterly fails to undermine the petition's critical point – that there are conflicting legal standards that result in different outcomes in these cases.

This case is also an excellent vehicle for resolution of the conflict. CBC's use of players' identities indisputably violates state-law publicity rights, App. 5a, cleanly presenting the constitutional questions. And the rationale for the Eighth Circuit's decision – that players already earn a handsome living – would eviscerate state-law publicity rights in virtually all cases involving incorporation of famous persons' identities into commercial products.

Without the players' identities, there would be no fantasy. CBC's games would be no more interesting or commercially viable than games in which participants pay to predict the weather at major cities around the globe. App. 60a.[1] Yet CBC claims a First Amendment right to exploit players' identities in commercial ventures without consent and in violation of its no-use and no-challenge contract obligations. The petition should be granted.

ARGUMENT

I. THE COURTS ARE IN CONFLICT ABOUT THE LEGAL TEST FOR BALANCING STATE-LAW PUBLICITY RIGHTS AGAINST FIRST AMENDMENT INTERESTS.

A. The Conflict Is Broad And Outcome Determinative.

CBC observes that (i) *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), held that state-law publicity rights are enforceable unless the state-law interests are outweighed by First Amendment interests, and (ii) courts addressing publicity-rights claims cite *Zacchini* and apply a balancing test. See Opp. 8. From this, CBC concludes that this case presents no conflict worthy of this Court's attention. This is akin to an argument that there can be no conflict of law under the Fourth Amendment because all courts agree that the constitutional standard is whether a search is reasonable.

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[1] Although CBC attempts to portray this case as concerning ownership of "statistics," *e.g.*, Opp. 5, it does not. The case concerns use of players' identities as playing pieces in predictive games.

It plainly does not follow from the fact that all courts cite *Zacchini* and conduct "balancing" that all courts apply the same standard or the correct standard. Each standard that this Court has articulated for First Amendment claims – from the strict scrutiny applied to restrictions on political speech, to the intermediate scrutiny applied to commercial speech regulations, to the varying formulations applied to libelous speech – imposes a "balancing" test. Yet these tests differ significantly in the presumptive weight given to the interests at stake and the manner in which those interests are assessed. Calling an approach "balancing" is only the first step in the judicial decision-making process.

Zacchini did not, as CBC claims, establish a legal test directly applicable here. *Zacchini* instead broadly outlined an approach that required interest-balancing but, in light of its peculiar facts, explicitly declined to address the "line . . . to be drawn" in other publicity-rights cases. 433 U.S. at 574-75. This Court expressly stated that the case was "more limited than the broad category of lawsuits that may arise under the heading of 'appropriation'" – presenting a "much narrower claim that respondent televised an entire act that he ordinarily gets paid to perform." *Id.* at 573 n.10. As the petition shows (pp. 16-24), courts across the country have used the "balancing" framework to craft a hodge-podge of different tests. CBC correctly notes that every case involves different facts, see Opp. 17. But, the lower courts' distinct approaches result in diverse outcomes in cases that are *factually indistinguishable* because the tests place dispositive weight on different aspects of the relevant state and federal interests. See Pet. 16-24. Had Missouri's predominant-purpose test or the Ninth Circuit's commercial-speech test been

employed, see *id.* at 16, 18, petitioners would have prevailed.[2] Now, the Eighth Circuit has added its own approach to the cacophony. An important conflict exists.

CBC argues that this Court should not resolve the conflict because (i) this is the first time MLBPA has complained of confusion in the lower courts' application of *Zacchini*, (ii) MLBPA identified in the Eighth Circuit only four of the lower courts' varying approaches, and (iii) MLBPA argued below that it should prevail under any test. See Opp. 14-15. The first point is wrong; the rest are irrelevant.

This is *not* the first time MLBPA has identified the differing lower court approaches at issue. MLBPA described many of these approaches in the court of appeals. Moreover, no rule of procedure or practice requires a party to describe *all* nuances of a lower court conflict to petition for certiorari on that issue.

CBC's contention that petitioners are judicially estopped from claiming here that the different lower court tests are outcome-determinative makes no sense and is legally wrong. *Id.* at 16. None of petitioners' arguments in the courts below was "'clearly inconsistent'" with their positions here. See *New Hampshire* v. *Maine*, 532 U.S. 742, 750 (2001). Petitioners certainly never claimed that an ad hoc balancing test was interchangeable with other articulated tests; they asserted that even under such a test, they should prevail. See Pet. 22-23. And,

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[2] CBC notes that this Court has twice denied review of the issue presented. Opp. 18. In both cases, the lower court's test would have resulted in a different outcome here. *See* Pet. 16-18, 18 (discussing *Doe* v. *TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003) (predominant-purpose test); *White* v. *Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992) (commercial-speech test)).

because the Eighth Circuit rejected petitioners' argument, judicial estoppel has no application. 532 U.S. at 749 ("judicial estoppel . . . 'prevents a party from *prevailing* in one phase of a case . . . and then relying on a contradictory argument to prevail in a later phase'") (emphasis supplied).

CBC also contends that this case is a "poor vehicle" for review of the constitutional issue, but the opposite is true. The violation of state-law publicity rights is clear and no material factual disputes exist, so the constitutional question is cleanly presented. And, the principal rationale of the decision below – that famous persons' publicity rights are outweighed by First Amendment interests when those persons otherwise earn substantial money – would eliminate publicity rights for most famous persons.

In response, CBC incorrectly argues that this vehicle should be passed over because most publicity-rights cases involve "endorsements and advertising," and this case does not. Opp. 18. Numerous cases involve the incorporation of famous persons' identities into commercial products. See, *e.g.*, 2 J. Thomas McCarthy, *The Rights of Publicity and Privacy*, §§ 7:1-7:31 (2d ed. 2005) (dividing uses of personal identity into "use in advertising" and "use on products" and citing numerous cases). And, plainly, the Eighth Circuit's disruption of reliance interests will lead to substantial litigation involving fantasy sports and other products incorporating famous persons' identities. See Brief *Amicus Curiae* of the National Football League Players Association and NFL Players Inc., 13-21 (filed Mar. 27, 2008).

Finally, if this case involved only the appropriation of a likeness to advertise an unrelated product – *e.g.*, using Derek Jeter's likeness to advertise pizza – the player's tort claim would be permitted without

serious First Amendment question. This case instead involves the use of famous persons' identities on products, and the effect of the First Amendment on publicity-rights claims is unsettled in that realm. The factual setting is an additional reason that this case is worthy of review.

Thirty years have passed since *Zacchini* was decided. In that interlude, the internet has emerged and created a new context for commerce, including internet products such as that at issue. Numerous courts have developed approaches for balancing state-law publicity rights with First Amendment interests in a variety of commercial settings wholly unlike that in *Zacchini*. The balancing tests utilized by the lower courts differ substantially and lead to different outcomes. The current incoherence and contradiction in this recurring, important area of federal law urgently need this Court's attention.

B. CBC's Attempted Distinction of *SFAA* Fails.

CBC argues that there is no conflict between this case and *San Francisco Arts & Athletics, Inc.* v. *U.S. Olympic Comm.*, 483 U.S. 522 (1987) *("SFAA")*, by reciting *SFAA*'s facts and saying that this case has different facts. CBC fails to address the basic problem that *SFAA* presents for its case. In *SFAA*, the Court held that Congress's decision to restrain private entities' use of the word "Olympic" for commercial purposes was "reasonabl[e]" and easily survived First Amendment scrutiny. *Id.* at 534-35. A State's decision to restrain use of famous persons' identities for commercial purposes is materially indistinguishable.

CBC wrongly claims that this case is different because it involves the more "substantial First

Amendment right in the free flow of information embodied in fantasy baseball." Opp. 12. In *SFAA*, however, this Court recognized that the use of the word "Olympic" in that context (to send a variety of messages about the gay athletes and the gay community generally) had "expressive" elements, but nonetheless declined to allow the organizers of the gay games to appropriate the value of the word "Olympics" that was more properly the "'harvest of those who have sown.'" 483 U.S. at 541.

Here, the only First Amendment interest CBC identifies is the right to sell a game that includes statistical information available without charge from numerous sources. Opp. 12. Thus, the First Amendment interest at stake in *SFAA* was significantly greater than the interest here; yet this Court found that those expressive interests were outweighed by the Olympic Committee's property interest. 483 U.S. at 535-37. The decision below cannot be reconciled with this analysis and outcome.

C. The Outcome Here Conflicts With The "Game Cases."

CBC does not truly dispute that the game cases represent established law that has given rise to significant reliance interests. Instead, it erroneously asserts that the outcome here is "not inconsistent" with those cases. See Opp. 13 (capitalization omitted).

First, CBC asserts that the game cases were decided before *Zacchini*. *Id.* This is beside the point. As noted, *Zacchini* does not state a rule that applies to appropriation cases generally. Moreover, nothing in *Zacchini* casts doubt on the analysis or outcome in the game cases which, post-*Zacchini*, have been cited as authoritative by numerous courts and prominent

practice treatises. See Pet. 26 (citing treatises, including *Restatement (2d) Torts* § 652C, cmt. b (1997) and *Restatement (Third) Unfair Competition*, § 47, cmts. b & c (1995)).

Second, CBC argues that two of the game cases do not weigh publicity rights against First Amendment interests. Opp. 13. Any fair reading of these cases reveals that the opposite is true. In *Palmer* v. *Schonhorn Enterprises, Inc.*, 232 A.2d 458 (N.J. Super. Ct. Ch. Div. 1967), the defendant argued that its use of golfers' identities and statistics in a board game must be protected because that same information would be protected if published in a newspaper. *Id.* at 460. The court's holding – that use of the information in a newspaper would be protected, while use in a "commercial product" was not, *id.* at 462 – directly rejects an argument based on First Amendment interests.

Palmer's holding and analysis is identical to that *Uhlaender* v. *Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970). There, the court held that even though baseball players' names and statistics are published in the news and are "in the public domain," players had the right to control their use in commercial products. *Id.* at 1282-83. Finally, *Rosemont Enterprises, Inc.* v. *Urban Systems, Inc.*, 340 N.Y.S. 2d 144 (N.Y. Sup. Ct. 1973), and related cases involving the incorporation of Howard Hughes' identity into commercial products, see Pet. 26, conduct the same analysis in First Amendment terms.

The critical point about the game cases is that their uniform, established holdings were viewed as the law, not just by treatise writers and courts, but also by the business community – famous persons and those seeking to license their publicity rights in

commercial settings. See, *e.g.*, NFLPA *Amicus* at 13-18. The overturning of these cases disrupts both substantial reliance interests and established law.

D. The Eighth Circuit's Balancing Misconstrued The Relevant Interests Identified In *Zacchini* and *SFAA*.

CBC also argues that the court below properly balanced the relevant interests. Although the merits are not the foremost consideration on petition, there are clear errors in the Eighth Circuit's balancing that would have been avoided had the court used a different approach.

First, CBC contends that the Eighth Circuit properly discounted the state-law interest because baseball players are handsomely compensated for their work in baseball and for endorsements. See Opp. 10; App. 9a. Most persons able to benefit financially from publicity rights are famous persons with other means of earning substantial incomes. It makes no sense to say that the more valuable a person's identity, the less protection from exploitation it deserves.

The related argument that players are not financially harmed by exploitation of their identities without compensation (Opp. 10; App. 55a) is illogical and wrong. Players have a state-law right to control the commercial exploitation of their identities and to benefit financially from licensing use of their identities. CBC's use of those identities without a license necessarily harms players' economic interests in the amount of the value that players could command on the market.

With respect to players' non-economic interests, CBC (Opp. 10) and the court also erred. The state-law right at issue is intended to protect a person's

inherent right to control the use of his or her identity. See Pet. 24. That interest is infringed when an outsider commercially exploits a famous person's identity without consent.

Finally, contrary to CBC's arguments (Opp. 10), the First Amendment interests here are not substantial. CBC is offering a product – fantasy baseball games – for sale. That product incorporates players' identities to entice consumer interest in what would otherwise be merely another prediction game. Unlike a newspaper's publication of statistics, any transfer of information from CBC to consumers during the course of the game is purely incidental to its operation.

And, it makes no difference that baseball players' names and statistics appear in the newspaper and on television every day. The names of famous persons, including baseball players, are published and broadcast regularly. Yet those names may not be incorporated without the famous persons' consent primarily for commercial purposes into a product – be it a coffee mug, a poster, a board game, or an internet game – without consent. That is what CBC has done and that is what petitioners challenge, not the reporting of baseball facts and statistics.

In sum, enforcement of the players' state-law publicity rights serves the state interests the tort is designed to further, and the First Amendment considerations are weak. There is no suppression of any idea; the statistical information provided in connection with the games is available freely elsewhere. In addition, any state-law limit on expression is narrowly confined to products that appropriate identities primarily for commercial purposes. The balance struck by the Eighth Circuit was wrong.

II. THE COURT'S REFUSAL TO ENFORCE CBC'S NO-USE AND NO-CHALLENGE AGREEMENTS IS WRONG AND PRESENTS A FEDERAL ISSUE WORTHY OF REVIEW.

CBC's Licensing Agreements obligated it not to use or challenge the players' contractually-defined rights when those Agreements expired. The Court of Appeals refused to allow petitioners to enforce CBC's contractual obligations. App. 10a-13a.[3]

In arguing that the Eighth Circuit's decision does not present a second issue worthy of review, CBC first claims that the Circuit's holding applies state law, not constitutional principles. For two reasons, this is incorrect. First, the Eighth Circuit interpreted the First Amendment to make an MLBPA "warranty" in the Licensing Agreement invalid. That conclusion was undoubtedly one of constitutional law.

Second, the petition demonstrated (as the dissent articulated, App. 14a-16a), that the Eighth Circuit effectively made the federal-law determination that First Amendment rights could not be waived through the no-use and no-challenge provisions in the Licensing Agreement. The decision that these provisions could not be enforced necessarily rests on a determination that First Amendment rights cannot be waived in this manner. Accordingly, it conflicts

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[3] CBC notes that it operated two years without a license, Opp. 3. But when CBC began selling through a national publication, *The Sporting News*, MLBPA enforced the players' publicity rights. CTA 1134. In addition, CBC, a multi-million dollar business, states several times that it was weak and thus coerced into signing its Licensing Agreements. *E.g.*, Opp. 4, 6. Nothing is cited in support of the claimed "threats" and poor-mouthing and nothing could be.

with authority in this Court and other courts of appeals. See Pet. 31-33.

Finally, CBC claims that the Eighth Circuit's refusal to enforce the no-use and no-challenge provisions is of no general importance. Opp. 20-21. But, CBC does not address – let alone refute – petitioners' and *amici*'s demonstration that such provisions are routinely included in licensing agreements; that they serve important business and policy interests; and that this decision calls into question their enforceability. Pet. 33-34; NFLPA *Amicus* at 20.

CONCLUSION

The petition should be granted.

Respectfully submitted,

MARY K. BRAZA
G. MICHAEL HALFENGER
FOLEY & LARDNER LLP
777 East Wisconsin Ave.
Milwaukee, WI 53202
(414) 271-2400

STEVEN A. FEHR
DONALD R. AUBRY
JOLLEY, WALSH, HURLEY
RAISHER & AUBRY, P.C.
204 West Linwood Blvd.
Kansas City, MO 64111
(816) 561-3755

VIRGINIA A. SEITZ*
PETER D. KEISLER
QUIN M. SORENSON
SIDLEY AUSTIN LLP
1501 K Street, N.W.
WASHINGTON, D.C. 20005
(202) 736-8000

RUSSELL S. JONES, JR.
TRAVIS A. SALMON
SHUGHART THOMSON
& KILROY, P.C.
120 West 12th Street
Kansas City, MO 64105
(816) 421-3355

Counsel for Petitioners

* Counsel of Record

May 12, 2008

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND BRIEF FOR NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION AND NATIONAL FOOTBALL LEAGUE PLAYERS INCORPORATED AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

BRUCE S. MEYER
CAITLIN J. HALLIGAN*
MELANIE P. SARWAL
SABRINA A. PERELMAN
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

* *Counsel of Record*

Counsel for Amici Curiae

214974

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF FOR NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION AND NATIONAL FOOTBALL LEAGUE PLAYERS INCORPORATED AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

The National Football League Players Association (NFLPA) and the National Football League Players Incorporated (Players Inc) request leave to file an *amici curiae* brief in support of Major League Baseball Advanced Media and The Major League Baseball Players Association's petition for a writ of certiorari.

The NFLPA is the labor union that acts as the exclusive collective-bargaining representative for professional football players in the National Football League. Under the terms of the standard, collectively-bargained NFL Player Contract, players expressly assign to NFLPA all of their "group licensing rights." In addition to the NFL Player Contract, players execute separate Group Licensing Assignments, which are agreements between each player and the NFLPA, under which the players' group-licensing rights are assigned to the NFLPA. The NFLPA holds such rights in connection with almost every NFL player.

These group-licensing rights are then licensed to Players Inc, a for-profit subsidiary of the NFLPA that licenses the intellectual-property rights of NFL players. Currently, Players Inc licenses over 70 companies in the United States and throughout the world to use various aspects of its group-licensing rights in connection with commercial products and services, ranging from artwork and collectibles to trading cards and interactive games.

The NFLPA and Players Inc's brief will assist the Court in its consideration of this petition for certiorari. Given the substantial value of their group-licensing rights, *amici* have a vital interest in clarification of the correct legal test for weighing the interests in enforcing publicity rights against the interests protected by the First Amendment. If left unreviewed, the Eighth Circuit's decision will threaten *amici*'s ability to license players' identities for commercial purposes. As explained more fully in *amici*'s brief, businesses covered by the Eighth Circuit's decision may now be able to reap the benefits of the labor, skills, and achievements of athletes and other celebrated figures, with no return to the individuals themselves. The Eighth Circuit's decision

also upsets settled business practices by compromising the ability of *amici* and other holders of publicity rights to enforce existing agreements that authorize use of an individual's identity and related information for commercial purposes.

Counsel for NFLPA and Players Inc have conferred with counsel for petitioners Major League Baseball Advanced Media and The Major League Baseball Players Association and for respondent C.B.C. Distribution and Marketing, Inc. Petitioners have granted consent for NFLPA and Players Inc to file an *amici curiae* brief in support of their petition. Respondent has withheld consent to NFLPA and Players Inc's filing an *amici curiae* brief.

NFLPA and Players Inc respectfully request that the Court grant leave to file this *amici curiae* brief.

Respectfully submitted,

BRUCE S. MEYER
CAITLIN J. HALLIGAN*
MELANIE P. SARWAL
SABRINA A. PERELMAN
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

* *Counsel of Record* *Counsel for Amici Curiae*

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No. 07-1099

IN THE

Supreme Court of the United States

MAJOR LEAGUE BASEBALL ADVANCED MEDIA AND THE MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,

Petitioners,

v.

C.B.C. DISTRIBUTION AND MARKETING, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION AND NATIONAL FOOTBALL LEAGUE PLAYERS INCORPORATED AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI*

The National Football League Players Association (NFLPA) and the National Football League Players Incorporated (Players Inc) submit this brief as *amici curiae*.[1] The NFLPA is the labor union that acts as the

[1] Pursuant to Rule 37.6, amici state that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, its members, or its counsel made a monetary contribution to its preparation or submission. Amici further state, pursuant to Rule 37.2(a), that the petitioners have consented to the filing of this brief and counsel of record for both parties have been given at least ten days notice of amici's intention to file this brief.

exclusive collective-bargaining representative for professional football players in the National Football League. Under the terms of the standard, collectively-bargained NFL Player Contract, players expressly assign to NFLPA all of their "group licensing rights," which encompass the use of the players' names, signatures, facsimile voices, pictures, photographs, likenesses, and biographical information in connection with licensing programs that involve groups of six or more players. In addition to the NFL Player Contract, players execute separate Group Licensing Assignments, which are agreements between each player and the NFLPA, under which the players' group-licensing rights are assigned to the NFLPA. The NFLPA holds such rights in connection with almost every NFL player.

These group-licensing rights are then licensed to Players Inc, a for-profit subsidiary of the NFLPA that licenses the intellectual-property rights of NFL players. Currently, Players Inc licenses over 70 companies in the United States and throughout the world to use various aspects of its group-licensing rights in connection with commercial products and services, ranging from artwork and collectibles to trading cards and interactive games. Among Players Inc's licensees are several fantasy-football-game providers that use NFL football players' identities in their online fantasy-football games, including ESPN, AOL, The Sporting News, Electronic Arts Inc., CBS Sportsline®, and Fox Sports.

The group-licensing rights generate millions of dollars in revenue annually. These funds support the operation of the NFLPA, including its collective bargaining efforts on behalf of all players. The NFLPA

has been vigilant in enforcing its group licensing rights; for example, it has commenced lawsuits against a variety of entities, including the predecessor to respondent C.B.C., that sought to exploit these rights without permission.

Amici have a vital interest in clarification of the correct legal test for weighing the interests in enforcing publicity rights against the interests protected by the First Amendment. If left unreviewed, the Eighth Circuit's decision will threaten *amici*'s ability to license players' identities for commercial purposes. Businesses such as respondent C.B.C. may be able to reap the benefits of the labor, skills, and achievements of athletes and other celebrated figures, with no return to the individuals themselves. *Amici* also seek review of the Eighth Circuit's decision because it compromises their ability to enforce existing agreements that authorize use of an individual's identity and related information for commercial purposes.

SUMMARY OF THE ARGUMENT

In deciding whether a fantasy baseball enterprise could assert a First Amendment defense against enforcement of publicity rights held by major league baseball players, the Eighth Circuit adopted an *ad hoc* balancing test to weigh the competing interests supporting publicity rights and the First Amendment. The court below dismissed the primary justification for publicity rights—the public interest in allowing individuals to reap the rewards of their endeavors—and invoked the First Amendment's general interest in the

availability of information to preclude enforcement of the ball players' publicity rights.

Review of the decision below by this Court is essential in order to resolve the growing confusion regarding First Amendment limitations on the enforcement of state-law publicity rights. The Eighth Circuit's decision deepened a pre-existing division among the federal and state courts over the correct legal test for balancing the economic interests that give rise to publicity rights against First Amendment interests. In light of this conflict, the ability of an athlete, artist, or any other celebrated figure to control purely commercial exploitation of his or her identity will likely depend on the jurisdiction in which a law suit is commenced. Only this Court can bring clarity to this important question of federal law, and it should grant certiorari to do so now.

Review of the Eighth Circuit's decision is also imperative because its *ad hoc* balancing test is completely inconsistent with this Court's decisions in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), and *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. 522 (1987). These cases confirm that publicity rights are intended to vindicate individuals' economic interests in their identities. The Eighth Circuit, in direct disregard of this principle, treated the remuneration available to successful baseball players as a factor that weighs strongly *against* enforcement of their publicity rights. If this Court's recognition of state-law publicity rights is to have any force, the Court must reiterate that the

financial interests which underpin publicity rights are legitimate and merit full consideration.

A grant of certiorari is further warranted because of the substantial degree to which the Eighth Circuit's decision has unsettled expectations surrounding licensing negotiations and arrangements in that jurisdiction. Numerous industries, ranging from the burgeoning fantasy sports industry to the many businesses that market sports-themed products and other items involving celebrity identities, rely on licensing agreements of the sort at issue here. The decision below draws into question the enforceability of these agreements, and greatly complicates negotiations for future licensing relationships. Because of the broad implications of the Eighth Circuit's disregard of state-law publicity rights, the Court should grant the petition for certiorari.

Reasons for Granting the Petition

I. This Court Should Grant Certiorari to Resolve Confusion Over the Extent to Which the First Amendment Limits Enforcement of Publicity Rights.

A. The Courts Are in Conflict About the Legal Test for Balancing Publicity Rights Against First Amendment Interests.

The right of publicity, adopted by statute or common law in approximately half the states, establishes for every person the right "to control the commercial use of his or her identity." 1 J. Thomas McCarthy, The Rights

OF PUBLICITY AND PRIVACY §§ 1:3, 6:3 (2d ed. 2007); *see also* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. c (1995) (right of publicity secures "the commercial value of . . . fame and prevents the unjust enrichment of others seeking to appropriate that value for themselves"). This Court first examined the interplay between state-law publicity rights and the First Amendment in *Zacchini*, and instructed that the states' interests in enforcing those rights must be weighed against First Amendment concerns. 433 U.S. at 575-78. In the absence of any further guidance, the federal and state courts have developed disparate tests for publicity-rights claims. Because the choice of the applicable legal standard for these claims is often outcome-determinative, the enforceability of publicity rights varies significantly from jurisdiction to jurisdiction—a result that is unfair to individuals and businesses alike.

In determining when a First Amendment defense may preclude the enforcement of publicity rights, some courts look to the manner in which an individual's identity is used. Missouri, Colorado, and New Jersey employ a "predominant purpose" test, which examines whether the central purpose in using a person's identity is predominantly expressive or commercial. *See Doe v. TCI Cablevision*, 110 S.W.3d 363, 373-74 (Mo. 2003); *Joe Dickerson & Assocs., LLC v. Dittmar*, 34 P.3d 995, 1003 (Colo. 2001); *Tellado v. Time-Life Books, Inc.*, 643 F.Supp. 904, 909-10 (D. N.J. 1986). New York and Virginia employ a similar, "purposes of trade" inquiry. Under this test, publicity rights are enforced when an individual's identity is used for purposes of trade (*e.g.*, advertising, marketing), unless the identity is used in a type of speech traditionally protected by the First Amendment (such

as a movie or novel). *See Town & Country Props., Inc. v. Riggins*, 457 S.E.2d 356, 362-63 (Va. 1995); *Gautier v. Pro-Football, Inc.*, 107 N.E.2d 485, 488 (N.Y. 1952); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 (1995).

California follows a different approach, asking whether the identity at issue has been changed. Its "transformative" test assesses whether the identity has been altered in a way that is expressive, as opposed to a communication in which a persona is used for purely commercial gain. *Winter v. DC Comics*, 69 P.3d 473, 478-79 (Cal. 2003); *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 807-08 (Cal. 2001).

The Ninth Circuit, by comparison, applies distinct standards depending on whether commercial speech is at issue. When celebrity identities are used in commercial speech (such as advertising), the Ninth Circuit fully enforces publicity rights; in matters involving non-commercial speech, publicity rights are enforced when actual malice is demonstrated. *See Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1188-89 (9th Cir. 2001); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1401 n.3 (9th Cir. 1992); *Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988).

Kentucky, along with the Second and Sixth Circuits, have developed a "relatedness" test, which considers the relationship between the use of a person's identity and any "work" traditionally protected by the First Amendment. *See Parks v. Laface Records*, 329 F.3d 437, 460-61 (6th Cir. 2003); *Rogers v. Grimaldi*, 875 F.2d 994, 1004-05 (2nd Cir. 1989); *Montgomery v. Montgomery*, 60 S.W.3d 524, 529-30 (Ky. 2001). Labeled an "amorphous"

test, *id.* at 535 (Keller, J., dissenting), this standard rejects publicity-rights claims against works traditionally protected by the First Amendment unless the persona is used solely to attract attention to the work and the work itself is not significantly related to the identified person. *See, e.g., Parks*, 329 F.3d at 460-61; *see also* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c (1995).

The Sixth Circuit has also employed, together with the Tenth and now the Eighth Circuits, an *ad hoc* balancing test that weighs society's interest in the use of a famous person's identity against that person's particular economic and noneconomic interests. Pet. App. 7a-9a; *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 938 (6th Cir. 2003); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 974 (10th Cir. 1996). In balancing those interests, the Sixth Circuit has at least recognized the foundations of the right of publicity: "to protect the commercial interest of celebrities in their identities" and to avoid "unauthorized commercial exploitation." *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (6th Cir. 1983). More recently, though, it has discounted the importance of those purposes by emphasizing otherwise available financial rewards. *ETW*, 332 F.3d at 938. The Eighth and Tenth Circuits have given negligible consideration to celebrities' interest in their publicity rights. They seek to justify this position based on the celebrities' perceived high incomes and ability to engage in other lucrative enterprises. Pet. App. 9a; *Cardtoons*, 95 F.3d at 974.

This latter approach essentially jettisons any meaningful balancing of the right of publicity and First

Amendment interests, as the decision below demonstrates. There is no dispute that the fantasy baseball games offered by respondent are a commercial enterprise that relies on professional athletes' identities as game pieces. Rather than examining what traditional First Amendment concerns might be at stake in this business, if any, and weighing those interests against the players' economic interests in controlling the use of their identities, the Eighth Circuit simply asserted that the information used in fantasy baseball games is "readily available in the public domain, and it would be a strange law that a person would not have a first amendment right to use information that is available to everyone." Pet. App. 7a.

In sum, there is growing disarray in the federal and state courts on the proper interplay between state-law publicity rights and the First Amendment. Until this Court clarifies the legal test for weighing these competing rights, enforcement of publicity rights will remain unpredictable, and negotiation of licensing agreements will become difficult as well. Accordingly, this Court should grant certiorari to resolve the issue.

B. The Decision Below Disregards This Court's Recognition That State-Law Publicity Rights Are Intended to Vindicate Economic Interests.

This Court has expressly recognized that the purpose of publicity rights is to vindicate the economic interests that celebrated individuals hold in their identities. Because the Eighth Circuit's decision is in

direct conflict with the precedents that establish this principle, review by this Court is appropriate.

In *Zacchini*, the Court upheld against a First Amendment challenge the publicity rights of an entertainer whose performance had been broadcast without consent. Observing that "[m]uch of [a performance's] economic value lies in the 'right of exclusive control over the publicity given to [the] performance,'" the Court identified several reasons for enforcing state laws that protect this prerogative. 433 U.S. at 575, 576.

First, enforcing publicity rights "prevent[s] unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay." *Id.* at 576 (quotation and citation omitted).

Second, just as patent and copyright laws encourage the production of works of public interest, the Court explained, enforcement of publicity rights creates an economic incentive for investing in the production of a performance of interest to the public. *Id.* at 576-77 (citing *Washingtonian Publ'g Co. v. Pearson*, 306 U.S. 30, 36 (1939)). In *San Francisco Arts*, the Court reiterated this rationale, noting that publicity rights are grounded in the recognition that a product derives from "talents and energy" and is "the end result of much time, effort, and expense." 483 U.S. at 532, 533 (quoting *Zacchini*, 433 U.S. at 575). In order to provide an incentive to develop a "quality product" that in turn benefits the public, the Court concluded, publicity rights are valid and

enforceable even where they result in incidental restrictions on expressive speech. *Id.* at 537 (citing 1 J. Thomas McCarthy, TRADEMARKS AND UNFAIR COMPETITION § 2:1, at 44-47 (1984)).

The Eighth Circuit cavalierly dismissed the importance of these economic interests that form the bedrock of state-law publicity rights. The court below found that respondent C.B.C. "uses baseball players' identities in its fantasy baseball products for purposes of profit . . . [and] commercial advantage," Pet. App. 7a, and acknowledged that "[p]ublicity rights . . . are meant to protect against the loss of financial gain," *id.* at 10a. The court, however, insisted that C.B.C.'s appropriation of the players' personas "barely, if at all, implicate[s] the interests that states typically intend to vindicate by providing rights of publicity to individuals." *Id.* at 9a.

According to the Eighth Circuit, the financial success enjoyed by professional baseball players, who may be paid "handsomely" and "can earn additional large sums from endorsements and sponsorships," strips the players of their state-law right to reap the benefits of their labor and skills. *Id.* The economic interests that underpin publicity rights, the court concluded, were not "especially relevant"—for the sole reason that "baseball players are rewarded separately for their labors." *Id.*

In addition to its other legal errors, that analysis turns on its head the rationale for enforcing publicity rights which this Court articulated in *Zacchini* and *San Francisco Arts*. As the court of appeals recognized, it is only by using the identities of the players—whose marketability and public profile are the result of innate

skill and years of hard work—that fantasy sports enterprises can offer their lucrative product. Discounting the economic interest that the players hold in controlling the use of their identities simply because a player is otherwise financially successful undermines the twin objectives of encouraging investment of human capital and avoiding commercial exploitation.

Because it places dispositive weight on whether an individual has been paid "handsomely," *id.*, the legal standard adopted by the court of appeals may preclude enforcement of publicity rights in a broad swath of cases. It is the identities of professional athletes, well-known artists and performers, and other celebrities that are frequently most valuable to the licensing community. And it is those very individuals who are often well compensated in light of their popularity. Yet under the Eighth Circuit's test, financial success essentially eviscerates their publicity rights. Indeed, it is unclear whether, as a practical matter, the right of publicity will retain any vitality in the jurisdictions governed by the Eighth Circuit's rule.

By tying the viability of a publicity-rights claim to an individual's opportunity to earn a significant income from other sources, the decision below also introduces tremendous uncertainty and arbitrariness into the enforcement of publicity rights. The Eighth Circuit has provided no guideposts for when an individual's salary or outside income might be large enough to preclude enforcement of a publicity-rights claim. Nor does the circuit court explain whether it had in mind the income level of particular individuals, or all players in a sport, or how to take into account the fact that some sports are

generally more lucrative than others. To the extent that publicity rights can be enforced at all under the Eighth Circuit's standard, the court of appeals offered paltry insight into how to apply its novel rule in a fair and predictable manner.

II. This Court Should Grant Certiorari Because The Decision Below Will Disrupt Settled Expectations in a Wide Range of Licensing Relationships.

A. The Eighth Circuit's Decision Calls Into Question Well-Settled Law Governing Publicity Rights.

Celebrated individuals, as well as the businesses that are authorized to use their identities, negotiate their licensing arrangements against the backdrop of well-settled law regarding publicity rights. *See, e.g.*, 2 J. Thomas McCarthy, The Rights of Publicity and Privacy §§ 7:1-7:29 (2d ed. 2007); Restatement (Second) of Torts § 652C cmt. b (1997); Restatement (Third) of Unfair Competition § 47 cmts. b & c (1995). Athletes and businesses in the sports industry have also relied for years on precedents that specifically recognize the enforceability of publicity rights when public personas are used in board games—a line of cases particularly apposite to the use of player identities in fantasy sports leagues. *See, e.g.*, *Uhlaender v. Henricksen*, 316 F.Supp. 1277 (D. Minn. 1970); *Rosemont Enters., Inc. v. Urban Sys., Inc.*, 340 N.Y.S.2d 144 (Sup. Ct. 1973); *Palmer v. Schonhorn Enters., Inc.*, 232 A.2d 458 (N.J. Super. Ct. Ch. Div. 1967).

By refusing to enforce players' publicity rights against a business that uses their identities exclusively for commercial gain, as opposed to a communication cloaked with a traditional First Amendment protection, the court of appeals has thrown this established law into substantial uncertainty. As the prior course of dealing between the parties here confirms, the use of players' names, likenesses, and statistical and biographical information in what is essentially an on-line board game has long been understood to require a license and payment of a royalty.

But the decision below has even more sweeping and disruptive consequences for long-standing commercial relationships. Respondent, a provider of fantasy sports games that had duly licensed the baseball players' identities, stipulated in its licensing agreement that upon termination of its license, it would not challenge the title held to the licensed rights held by the players' association or make further use of the licensed rights ("no challenge" and "no use" clauses). Pet. App. 10a-11a. On the basis of a contractual warranty provision never cited or briefed by the parties, the court of appeals *sua sponte* excused respondent from its obligation on a flimsy ground: that in light of the court's conclusion that the First Amendment prevented assertion of this right, the baseball players' association supposedly breached a warranty that it was the owner of the players' right to exclusive use of their identities. *Id.* at 12a-13a; *id.* at 14a (Colloton, J., dissenting).

This abrogation of the parties' contract by the Eighth Circuit's decision throws into serious doubt the validity of no-challenge and no-use provisions in

countless licensing agreements that have already been negotiated and executed and may be litigated within the Eighth Circuit's jurisdiction. These provisions routinely appear in licensing agreements and are critical to those agreements and to the rights of the athletes. If they are rendered unenforceable whenever a licensee's First Amendment rights are implicated, as the Eighth Circuit held, then their efficacy has been all but eviscerated.

B. The Eighth Circuit's Decision Has Significant Consequences for Commercial Relationships Involving Athletes in Many Sports, As Well As Other Celebrities.

In its narrowest application, the lower court's decision undermines the value of professional baseball players' identities in fantasy baseball games. But by calling into question professional athletes' continued ability to license their identities for use in these popular games, the Eighth Circuit's decision has consequences for the entire fantasy sports industry. The decision also casts significant doubt more broadly on the continued viability of the right of publicity not only for athletes, but for all individuals who previously enjoyed the ability to license their personas for commercial use. Given the broad consequences of the lower court's decision for individuals subject to the Eighth Circuit's decision, this Court should grant the petition for certiorari.

1. The Eighth Circuit's Decision Will Undermine the Entire Fantasy Sports Industry, Which is Already Large and Rapidly Growing.

The court of appeals' decision will have substantial effects on many athletes who previously enjoyed the right to license their identities for use in commercial fantasy sports leagues—a multi-billion dollar industry that is continuing to grow.

Fantasy sports have become wildly popular. Recent estimates put the number of people playing fantasy sports at between 15 and 30 million. *See* J. Rubner, *Technology Exec Tackles Fantasy Ball*, ATLANTA BUS. CHRON., Aug. 31, 2007 (19 million players in North America); G. Wang, *Fantasy Football's Growth Felt on Halloween, Big Screen*, WASH. POST, Nov. 2, 2006, at E10 (20 million); C. Holahan, *Fantasy Football 2.0*, BUS. WK. ONLINE, Sept. 1, 2006 (more than 15 million adults play fantasy sports). The industry has experienced annual growth of 10% in recent years, and the annual financial impact of the fantasy sports industry has been estimated at $1 billion to $4 billion. *See* B. Garrity, *Fantasy Sports Dark Horse Goes Long*, N.Y. POST, Nov. 22, 2007, at 31 (20% annual growth); Rubner, *supra* (economic impact of $3-4 billion); Wang, *supra* at E10 ($1-2 billion).

Amici, the National Football League Players Association and its subsidiary Players Inc, will be especially hard hit by the decision below. Fantasy football is by far the most popular fantasy sport, accounting for over 11 million players and approximately 50% of the overall revenues of the fantasy sports industry.

See By the Numbers, CHI. TRIB., Sept. 7, 2006, at 22; *see also* Garrity, *supra* at 31 (fantasy baseball is next most popular fantasy sport, accounting for 3 million players). Fantasy football will only continue to increase in popularity, as it is estimated that the number of fantasy football players is growing at 7-10% per year. Wang, *supra* at E10.

The commercial success of fantasy baseball and fantasy football has also encouraged the development of new fantasy sports competitions, including soccer, golf, hockey, lacrosse, NASCAR, track & field, and bowling. *See With a New Look Comes Variety*, MIAMI HERALD, Oct. 22, 2006, at D19 (noting development of Professional Bowlers Association's Fantasy Bowling Challenge); Y. Noguchi, *With World Cup, A New Media Game*, WASH. POST, June 10, 2006, at D01 (noting FIFA World Cup website's fantasy soccer competition); K. Yamamura, *It's Finals Fantasy in This Track League*, SACRAMENTO BEE, June 13, 2003, at C1 (describing emergence of fantasy track and field); S. Berg, *Certain Statistics You Don't Want Anyone Keeping*, WASH. POST, Nov. 8, 2002, at T31 (noting emergence of fantasy golf, hockey, and stock car racing). Fantasy leagues have even developed for professional wrestling, X-games, and bass fishing. *See* C. Walker, *A Big Catch; Fantasy Fishing Tournament Offers $1M Grand Prize*, BALT. SUN, Feb. 1, 2008, at 18Z; Berg, *supra* at T31. These recent additions to the fantasy sports world, along with the industry leaders, will be significantly affected by the Eighth Circuit's ruling.

2. The Enforceability of Athletes' Publicity Rights in the Larger Sports Industry Is Now Unclear.

In addition to undermining the licensing relationships of athletes in the fantasy sports arena, the Eighth Circuit's decision casts doubt on the continued enforceability of athletes' publicity rights with respect to commercial products and services in general. The court's sanctioning of the use of a player's identity incorporated as a game piece in a fantasy sports product may be viewed as an invitation to use players' identities without consent in other products, and will potentially have a substantial effect on all the multi-billion dollar merchandising of commercial products bearing athletes' names or likenesses.

Each professional sports league, including the National Football League, the National Hockey League, and the National Basketball Association, has developed an extensive program for the licensing of intellectual property, including the likenesses and identities of the leagues' players, in association with a large array of goods and services. Merchandise includes apparel, sporting goods, trading cards, action figures, commemorative memorabilia, posters, video recordings, video games, toys, and school supplies. Officially licensed sports-themed products and services, including those products and services licensed by sports leagues, generate billions of dollars in retail sales each year. *See, e.g.*, A. Schoettle, *What's In a Name? Lawsuit Could Lead Speedway to Change Licensing Policy*, INDIANAPOLIS BUS. J., May 16, 2005, at 3 ("Sports licensing has grown into a $17 billion annual worldwide

business."); F. Barringer, *The Media Business: Advertising—Addenda, Sales Rise 1.7% for Licensed Goods*, N.Y. TIMES, Jan. 9, 2003, at C6 (sports licensing sector rose 8%, to $11.3 billion); E. Fisher, *License to Go Out of Bounds: Sports Leagues Put Their Team Names on a Variety of Off-the-Wall Products*, WASH. TIMES, Nov. 23, 2001, at A1 (U.S. sports licensing business approaches $12 billion in annual sales).

The NFL has the largest share of the U.S. sports licensing business. *See* J. Goldblatt, *Eagles Gear Is Golden*, NEWS J., Jan. 14, 2004, at 113A (in 2003, NFL became largest pro sports licensor and world's fourth-largest licensor behind leaders Disney and Warner Brothers). NFL merchandising sales exceed $3 billion per year. *See* K. Goldberg Goff, *A Woman's Game*, WASH. TIMES, Oct. 28, 2007, at D01; E. Fisher, *NFL Sales Supremacy in Jeopardy*, WASH. TIMES, July 25, 2004, at C03.

The identities of the players enhance the value of these sales. Consumers buy a football jersey, for example, emblazoned with a player's name and number because of that individual's athletic prowess and the achievements of his team. *Amici* expend significant effort and resources to enhance the marketability of players' identities and promote their images. *See* Nat'l Football League Players Ass'n, http://www.nflplayers.com/user/template.aspx?mid=182&lmid=351&pid=0&type=n (describing efforts to "creat[e] player marketing opportunities, increase[e] brand awareness and develop[] valuable business partnerships") (last visited Mar. 20, 2008).

The Eighth Circuit's decision creates substantial uncertainty for athletes' continued reliance on their publicity rights in negotiating licensing contracts and entering into business relationships. The value of the players' labor and skill, as well as the efforts of players' associations, stands to be captured not by the players themselves, but by businesses such as respondent who seek to free ride on athletic accomplishments.

3. The Eighth Circuit's Decision Also Raises Wider Doubts Regarding Celebrities' Publicity Rights.

The Eighth Circuit's decision casts doubt not just on the enforceability of professional athletes' publicity rights, but on the rights of all celebrities who may be subject to this ruling—artists, performers, and other individuals—to receive compensation in exchange for the use of their names, likeness, and personas for commercial purposes.

The range of commercial products that use celebrity identities is limited only by the imagination. For example, commemorative posters, games, school supplies, candy dispensers, beverage stirring rods, and statuette replicas all have been the subject of litigation. *See, e.g.*, *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 222 (2d Cir. 1978) (Elvis Presley's photograph on poster); *Martin Luther King, Jr., Ctr. for Social Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697 (Ga. 1982) (plastic busts of Martin Luther King, Jr.); *Lugosi v. Universal Pictures*, 603 P.2d 425 (Cal. 1979) (Bella Lugosi's likeness on such products as plastic toy pencil sharpeners, soap products, target games, candy

dispensers, beverage stirring rods, shirts, cards, kites, bar accessories, and Halloween costumes); *Rosemont*, 340 N.Y.S.2d at 144 (board game with Howard Hughes's name and biographical information). Licensing of celebrity identities is a billion-dollar industry, making the scope of the licensing arrangements at issue undeniably substantial. *See, e.g.*, D. Barboza, *Advertising; The Business of "Preserving, Protecting and Insuring" the Legacy of Martin Luther King, Jr.*, N.Y. TIMES, April 1, 1996, at D7 (celebrity licensing industry grossed $2.5 billion in North America in 1995); W. Randle, *A "Who's Hot" of Licensing, Celebrity Endorsements Booming Retail Segment*, CHI. TRIB., May 28, 1990, at C1 ("Celebrity licensing is one of 9 or 10 major licensing categories and accounted for about 5 percent, or $3.5 billion, of last year's sales.").

The Eighth Circuit's decision introduces uncertainties regarding the ability of celebrated individuals to license the use of their identities in such commercial products in the future. It also unsettles the business reliance interests in countless existing licensing agreements involving athletes and other performers. To bring certainty to this pressing question and to clarify when the First Amendment precludes enforcement of publicity rights, this Court should grant the petition for certiorari.

Conclusion

For these reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Bruce S. Meyer
Caitlin J. Halligan*
Melanie P. Sarwal
Sabrina A. Perelman
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

* *Counsel of Record* *Counsel for Amici Curiae*

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